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THE

PUNJAB RECORD,

OR

Reference Book for Civil Officers.

VOLUME XXVII.

1892.

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Lahore :

THE "CIVIL AND MILITARY GAZETTE" PRESS.

1893.

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The references are to the Nos. given to the cases in the "Record."

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under Section 562 as regards one defendant and dismissing the appeal as regards the other defendants—More than one decree in same suit.—J. sued D. B. the mother of the girl, and the girl's three uncles, for Rs. 1,000 damages for an alleged breach of a betrothal contract. After settlement of issues, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. D. B., the mother did not sign the agreement, but K. M., one of the uncles, stated that he was representing her, and that he joined her in the reference to arbitration with her full knowledge and consent.

An award was given in favour of the plaintiff, upon which judgment and decree followed against all four defendants.

Upon appeal by the defendants, the Divisional Judge held that the award was inoperative as regards D. B., unless it could be shown that she had ratified the submission to arbitration, but that the award was good as regards the parties who had consented to the reference. The Divisional Judge accordingly remanded the case under Section 562, Civil Procedure Code, for decision as regards D. B., and dismissed the appeal as regards the three male defendants.

Held, on further appeal, that the decree of the Divisional Judge was bad in law. He could not legally dispose of the appeal finally as regards the three male defendants and re-open the case by a remand as regards the fourth,—the almost inevitable result of such procedure being that, eventually, there would be more than one, and possibly conflicting decrees, in the one suit.

Observations on the question whether D. B. was a party to the reference to arbitration. *Punjab Record*, No. 4 of 1882 (F. B.) and No. 170 of 1883, referred to 3

Appeal—Duty of Appellate Courts—Suit for land awarded at partition of whole culturable land of village—Parties—Duty of Appellate Court.—The plaintiff sued eleven defendants for possession of a small corner of *gorah* land which had been awarded to him at a partition of the whole culturable land of the village.

The Court of first instance impleaded the whole proprietary-body as co-defendants.

In his appeal to the Divisional Court, the plaintiff again made the eleven original defendants, respondents.

The Divisional Judge rejected the appeal on the ground (*inter alia*) that the whole of the proprietary body had not been made respondents.

Held, that the Divisional Judge was not justified in rejecting the appeal for want of parties, there being no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by Appellate Courts. Two courses were open to the Court :

- (1) To decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court ; or
- (2) To have used the power given it by Section 559, Civil Procedure Code, if the Court considered it necessary, and to have directed that the other defendants be made respondents.

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<i>Held</i> , also, that the suit (which was instituted while the Punjab Land Revenue Act, 1871, was in force) was not excluded from the cognizance of the Civil Courts by the provisions of that Act ...	5
<i>Appeal—Duty of Appellate Court—Remand order made under Section 562, Civil Procedure Code—Duty of Appellate Court hearing appeal from such order under Section 588 (28).—</i> An Appellate Court hearing an appeal preferred under Section 588 (28), Civil Procedure Code, 1882, from an order of remand passed under Section 562 by a subordinate appellate Court, is not necessarily confined to considering the question, whether the order of remand impugned is justified by the terms of the section, but may, when a preliminary point is found to exist, enter into and decide upon the merits of such preliminary point. But as soon as it is held that the remand order appealed from is not warranted by the terms of Section 562, inasmuch as the case has not been disposed of by the lower Court upon a preliminary point, the Court hearing the appeal under Section 588 (28), cannot enter upon or in any way deal with the merits of such remand order.	
I. L. R., 7 All., 136 and 17 Cal., 168, followed ...	6
" " " <i>Land Acquisition Act, 1870, Section 29—Agreement of Judge and assessors as to compensation—Finality of decision—</i> In case the Judge and one or both of the assessors agree as to the amount of compensation in a reference made to the Court under the provisions of Part III of the Land Acquisition Act, 1870, their decision thereon shall be final, and no appeal lies, even if they differ upon minor points not falling within the scope of their jurisdiction ...	36
" " " <i>Punjab Courts Act, Section 39 (b) and (c)—Value of suit—Mesne profits—Course of appeal.—</i> The plaintiffs sued for mesne profits alleged to have been realised by a Receiver. The plaintiffs, for the purposes of Section 50, Civil Procedure Code, valued the relief sought, approximately, at Rs. 2,000. They were decreed Rs. 3,405-15-6, and they appealed for Rs. 1,946 more. The defendants also appealed against the whole decree.	
<i>Held</i> , that the appeal from the District Judge's decree lay to the Divisional Court and not to the Chief Court.	
<i>Punjab Record</i> , No. 63, of 1891, referred to... ..	40
" " " <i>Appellate Court—Appeal of one defendant—Decree in favour of plaintiff-respondent who has not appealed, against another respondent—Civil Procedure Code, Sections 544 and 561—</i> There is no rule of procedure, which would justify an Appellate Court, on the appeal of one defendant, in decreeing in favour of a plaintiff-respondent against another respondent who was also a defendant in the first Court, in the absence of any appeal or cross-objection by the plaintiff filed in the Appellate Court.	
The general rule is that an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal: the Code of Civil Procedure provides at least two exceptions to this rule, which are contained in Sections 544 and 561 of the Code	46
" " " <i>Decree for pre-emption—Civil Procedure Code, Sections 214 and 244.—</i> A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any	

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objection, and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.

Held, that the order of the lower Court was correct. Currency notes are money in the ordinary acceptance of the term, although they may be notes of a different Circle from that in which they are tendered. The words "purchase money" are not defined, and there is nothing either in Section 17, Punjab Laws Act, or in Section 214, Civil Procedure Code, 1882, to put a restricted or technical meaning upon them. *Punjab Record*, No. 70 of 1890, distinguished.

Held, also, that an appeal lay from the order in question under Section 244 (c), Civil Procedure Code, the order relating to the execution of the decree

67

*Appeal—Duty of Appellate Court—Suit for account—Value of relief sought—Jurisdiction—Course of appeal—Authority of Appellate Court disclaiming jurisdiction, to order payment of additional Court Fee—*The plaintiff sued the defendant for an account valuing the relief sought at Rs. 100, and expressing his willingness to pay the Court fee due upon any sum decreed in excess of this amount, in accordance with the provisions of Section 11, Court Fees Act, 1870.

After the defendant had produced the books containing the parties' accounts and a commission had examined the same, the plaintiff filed a petition stating that he appeared to be *prima facie* entitled to recover a sum over Rs. 12,000 and praying that the matter might be fully investigated. No amendment of the plaint was, however, either asked for or ordered, and the suit eventually resulted in a decree in the plaintiff's favour for Rs. 2,343.

The plaintiff then appealed for a further sum of Rs. 1,716 and the defendant, against the decree in the plaintiff's favour, for Rs. 2,343.

Both parties presented their appeals to the Divisional Judge, who held that the appeals lay to the Chief Court.

Held, that the appeals lay to the Divisional Judge: under Section 7, clause (iv) of the Court Fees Act, the valuation of the original suit for purposes of Court Fees is fixed at the amount at which the relief sought is valued in the plaint. This, in the present case, was Rs. 100 and the amount was never altered by any amendment of the plaint: and under Section 8, Suits Valuation Act, 1887, the value of a suit for an account as determinable for the computation of Court Fees and the value for purposes of jurisdiction, shall be the same.

The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisional Court under Section 39, Punjab Courts Act (as amended).

Semle.—If an Appellate Court has no jurisdiction to hear an appeal it is not competent to it to pass orders for the payment of any additional Court fee which it considers should have been levied in the first Court—[*Cf. Punjab Record*, No. 40 of 1892]

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" " *Appeal by plaintiffs to Chief Court who did not appeal to Divisional Judge—Competency of appeal.*—Eighteen persons instituted a suit for an account against seventeen others. The first Court dismissed the suit.

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Two of the plaintiffs appealed to the Divisional Court, and, after a remand under Section 566, Civil Procedure Code, a decree was made in their favour against defendant 1 for Rs. 103-8-0 being the proportion to which they were held entitled out of a total sum of Rs. 1,457-5-0 for which defendant was found to be liable.

Some of the other plaintiffs, who had not appealed to the Divisional Court, then preferred a further appeal to the Chief Court urging that the Divisional Judge should have given them a decree for their proportionate share.

Held, that such further appeal was not competent, the appellants not being parties to the appeal before the Divisional Judge, nor affected in any way by the decree made by him. [Cf. *Punjab Record*, No. 46 of 1892]

123

Appointment of heir—See *Custom, Adoption*.

Arbitration—*Consent of all the parties to the suit*—Section 506, Civil Procedure Code—*Appellate Court remanding on appeal under Section 562 as regards one defendant and dismissing the appeal as regards the other defendants—More than one decree in same suit*.—J. sued D. B., the mother of the girl, and the girl's three uncles, for Rs. 1,000 damages for an alleged breach of a betrothal contract. After settlement of issues, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. D. B., the mother did not sign the agreement, but K. M., one of the uncles, stated that he was representing her and that he joined her in the reference to arbitration with her full knowledge and consent.

An award was given in favour of the plaintiff, upon which judgment and decree followed against all four defendants.

Upon appeal by the defendants, the Divisional Judge held that the award was inoperative as regards D. B., unless it could be shown that she had ratified the submission to arbitration, but that the award was good as regards the parties who had consented to the reference. The Divisional Judge accordingly remanded the case under Section 562, Civil Procedure Code, for decision as regards D. B., and dismissed the appeal as regards the three male defendants.

Held, on further appeal, that the decree of the Divisional Judge was bad in law. He could not legally dispose of the appeal finally as regards the three male defendants and re-open the case by a remand as regards the fourth,—the almost inevitable result of such procedure being that eventually there would be more than one, and possibly conflicting, decrees in the one suit.

Observation on the question whether D. B. was a party to the reference to arbitration. *Punjab Record*, No. 4 of 1882 (F. B.) and No. 70 of 1883, referred to... ..

3

.. *Suit for property claimed under private reference to arbitration—Validity of award*—*Award though bad in part when good for the rest*.—The two sons and the widow of R. referred the question of the partition of R.'s property to two arbitrators. The arbitrators duly made an award dividing the property, which was partly situate in the Punjab and partly at Baroda (Bombay Presidency).

The eldest son instituted a suit to recover possession of certain of the property situate at Amritsar which fell to his share under the award.

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The defendants contended, *inter alia*, that the award was incomplete and invalid in that it failed to make a complete partition of the Baroda property.

Held, that the objection was not sustainable. This was not a proceeding to enforce an award under the Civil Procedure Code, in which case it would be necessary either to affirm the award in its entirety or wholly reject it. It was open to the Court in the present proceeding to consider whether the rest of the award might not be good, even though one portion of it was bad.

Where arbitrators act in excess of their authority and this portion of their award can be struck out, and the remainder of the award still contains a final determination of all material questions submitted, the valid portion of the award may be maintained and the void portion rejected.

The principle, that though the award be deficient as to a matter within the submission, if it be separable, the rest of the award may often be supported, adopted and applied

18

Aulad—Custom—Alienation—Right of near female collateral—Kanwali Arains of Lahore District—Meaning of aulad.—Found in a suit the parties to which were Kanwali Arains of the Lahore District, that by custom a near female collateral was not competent to object to a sale of land and houses by the deceased owner's widow.

Observations as to the meaning of the term *aulad*

89

B.

Buildings, Demolition of—Joint owners—Erection of building by one, on common land—Absence of special damage to others.—The defendant, who was a proprietor in Gohana (Rohtak District), erected a pakka building upon a portion of the *abadi*—208 yards in extent—or common property of the village. The building was commenced within a very few months before suit, and was immediately objected to by at least one of the plaintiffs. It was completed in spite of the plaintiff's protests and appeal to the Revenue authorities, at or about the date when the present suit was launched. The defendant spent Rs. 1,000 or thereabouts upon the building, which was adjacent to, if not built on to, his own house. No acquiescence on the plaintiffs' part was established.

The plaintiffs, sixteen proprietors of Gohana, sued to have the building demolished. They did not succeed in proving any substantial damage from the building, over and above the fact that defendant had probably monopolized a larger share of this particular portion of the common land than would fall to him at a division.

Held, that the plaintiffs' appeal must be dismissed upon the ground that, it not being satisfactorily established that any substantial mischief had accrued to the plaintiffs from the completed building erected at considerable expense, the lower Court had exercised a wise discretion in refusing to order its demolition

54

Burden of proof--See *Evidence*.

C.

Cause of action—Criminal Procedure Code, 1882, Sections 133 and 137—Public place—Right to sue for declaration of rights in Civil Court.--Notwithstand-

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ing the words in Section 133, Criminal Procedure Code, 1882: "No order duly made by a Magistrate under this section shall be called in question in any Civil Court," it is open to a person who claims to be the sole proprietor of land, with reference to which a Magistrate has made a conditional order under the said section treating it as a "public place," which conditional order has, in due course of law, been made absolute under Section 137 of the Code, to sue the opposite party in the Civil Court for a declaration of his rights in such land.

Punjab Record, No. 94 of 1889, overruled ...

34

*Cause of action.—Right to sue—Suit to contest alienation on ground of relationship—Failure to prove allegations—Enquiry as to plaintiffs' rights as ultimate heirs.—*The plaintiffs sued on the allegation that they were collateral heirs of S. S. in the fifth degree. The lower Appellate Court, while agreeing with the Court of first instance that the plaintiffs had failed to establish any definite relationship to S. S., remanded the suit for an inquiry as to whether plaintiffs were not entitled to sue as the ultimate heirs, being members of the same *gôt* as S. S., and therefore presumably descended from a common ancestor and also being proprietors in the same division of the village. Ultimately it was decided that the plaintiffs could sue as being of the same *gôt* and *patti* as S. S.

Held, that the decree of the lower Appellate Court must be reversed. No distinct relationship to S. S. and no custom entitling them to sue upon the grounds set up on their behalf by the Appellate Court was established by the plaintiffs.

Punjab Record, No. 78 of 1888, referred to and distinguished ...

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Certificate of sale—See Execution of Decree.

Charge—See Mortgage.

„ *Interest.*

Civil Procedure Code (Act XIV of 1882).—See Land Acquisition Act, 1870.

„ „ „ *Arbitration—Consent of all parties to the suit—Section 506, Civil Procedure Code—Appellate Court remanding an appeal under Section 562 as regards one defendant and dismissing the appeal as regards the other defendant—More than one decree in same suit.—*J. sued D. B., the mother of the girl, and the girl's three uncles, for Rs. 1,000 damages for an alleged breach of a betrothal contract. After settlement of issues, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. D. B., the mother, did not sign the agreement, but K. M., one of the uncles, stated that he was representing her and that he joined her in the reference to arbitration with her full knowledge and consent.

An award was given in favour of the plaintiff, upon which judgment and decree followed against all four defendants.

Upon appeal by the defendants, the Divisional Judge held that the award was inoperative as regards D. B., unless it could be shown that she had ratified the submission to arbitration, but that the award was good as regards the parties who had consented to the reference. The Divisional Judge accordingly remanded the case under Section 562, Civil Procedure Code, for decision as regards D. B., and dismissed the appeal as regards the three male defendants.

The references are to the Nos. given to the cases in the "Record."

No.

Held, on further appeal, that the decree of the Divisional Judge was bad in law. He could not legally dispose of the appeal finally as regards the three male defendants and re-open the case by a remand as regards the fourth,—the almost inevitable result of such procedure being that, eventually, there would be more than one, and possibly conflicting, decrees in the one suit.

Observations on the question whether D. B. was a party to the reference to arbitration. *Punjab Record*, No. 4 of 1882 (F. B.) and No. 170 of 1883, referred to 3

Civil Procedure Code (Act XIV of 1882).—Suit for land awarded at partition of whole culturable land of village—Parties—Duty of Appellate Court.—The plaintiff sued eleven defendants for possession of a small corner of *gorah* land which had been awarded to him at a partition of the whole culturable land of the village.

The Court of first instance impleaded the whole proprietary body as co-defendants.

In his appeal to the Divisional Court, the plaintiff again made the eleven original defendants, respondents.

The Divisional Judge rejected the appeal on the ground (*inter alia*) that the whole of the proprietary body had not been made respondents.

Held, that the Divisional Judge was not justified in rejecting the appeal for want of parties, there being no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by Appellate Courts. Two courses were open to the Court:

- (1) to decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court; or
- (2) to have used the power given it by Section 559, Civil Procedure Code, if the Court considered it necessary, and to have directed that the other defendants be made respondents.

Held, also, that the suit (which was instituted while the Punjab Land Revenue Act, 1871, was in force) was not excluded from the cognizance of the Civil Courts by the provisions of that Act ... 5

"

Remand order made under Section 562, Civil Procedure Code—Duty of Appellate Court hearing appeal from such order under Section 588 (28).—An Appellate Court hearing an appeal preferred under Section 588 (28), Civil Procedure Code, 1882, from an order of remand passed under Section 562 by a subordinate Appellate Court, is not necessarily confined to considering the question, whether the order of remand impugned is justified by the terms of the section, but may, when a preliminary point is found to exist, enter into and decide upon the merits of such preliminary point. But as soon as it is held that the remand order appealed from is not warranted by the terms of Section 562, inasmuch as the case has not been disposed of by the lower Court upon a preliminary point, the Court hearing the appeal under Section 588 (28) cannot enter upon or in any way deal with the merits of such remand order.

I. L. R., 7 All., 136 and 17 Calc., 168, followed 6

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<i>Civil Procedure Code Act (XIV of 1882)—Section 230 (b)—Annual or monthly payments—Decree directing payment at a certain date.—Decrees for annual or monthly payments fall within and are governed by the provisions of Section 230 (b), Civil Procedure Code, 1882</i>	13
" " " " " <i>Suit for property claimed under private reference to arbitration—Validity of award—Award though bad in part when good for the rest.—The two sons and the widow of R. referred the question of the partition of R.'s property to two arbitrators. The arbitrators duly made an award dividing the property, which was partly situate in the Punjab and partly at Baroda (Bombay Presidency).</i>	
The eldest son instituted a suit to recover possession of certain of the property situate at Amritsar which fell to his share under the award.	
The defendants contended, <i>inter alia</i> , that the award was incomplete and invalid in that it failed to make a complete partition of the Baroda property.	
<i>Held</i> , that the objection was not sustainable. This was not a proceeding to enforce an award under the Civil Procedure Code, in which case it would be necessary either to affirm the award in its entirety or wholly reject it. It was open to the Court in the present proceeding to consider whether the rest of the award might not be good, even though one portion of it was bad.	
Where arbitrators act in excess of their authority and this portion of their award can be struck out, and the remainder of the award still contains a final determination of all material questions submitted, the valid portion of the award may be maintained and the void portion rejected.	
The principle, that though the award be deficient as to a matter within the submission, if it be separable, the rest of the award may often be supported, adopted and applied	
" " " " " <i>Civil Procedure Code, Section 617—Reference.—Observations as to the making of references to the Chief Court under Section 617, Civil Procedure Code, in cases in which further appeal will lie upon a Certificate granted by the Divisional Judge, or in which an application for revision can be preferred under Section 622 of the Code</i>	18
" " " " " <i>Material irregularity—Grounds for revision.—It is a material irregularity and forms a ground for revision when the lower Courts act upon a misrepresentation of a fact apparent upon the record, or the erroneous assumption of a fact, or the application of a rule, or a failure to appreciate the true points for determination raised by a general issue, such as one of <i>res judicata</i> or limitation, when such irregularity results in the dismissal of a suit on a technical ground, apart from the merits, which can be shown to be erroneous.</i>	19
<i>Punjab Record</i> , No. 105 of 1888, Nos. 42, 130 and 206 of 1889, Nos. 6 and 103 of 1890, and Nos. 60 and 65 of 1891, referred to	
" " " " " <i>Sale in execution of decrees—Absence of certificate of sale—Suit by purchaser—Title against party to the suit or his representative in interest.—The plaintiff sued, alleging that he was the purchaser of a house at an execution sale following decree against B., defendant 2, on account of a debt due from B.'s deceased husband.</i>	26

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The defendant 1 was B.'s second husband, and defendant 3 her son. The plaintiff could produce no certificate of sale.

Held, that the non-production of a certificate was not fatal to the plaintiff's claim.

When the plaintiff is suing to eject not a third party, but the very person who was a party to the suit which led to the execution sale, or persons whose interests are identical with such party, the mere omission to produce a certificate of sale is not fatal to the success of the suit. A party to the suit, or his representative in interest, cannot, after the sale has been confirmed, dispute the purchaser's title, as the order confirming the sale completes the title as against the parties to the suit.

I. L. R., 12 Bom., 589, followed ... 27

Civil Procedure Code (Act XIV of 1882).—Execution of decrees—Leave to withdraw—Effect of Sections 373 and 647, Civil Procedure Code.—The decision of the High Court of Allahabad (I. L. R., 12 All., 392) that Section 647 of the Civil Procedure Code makes Section 373 applicable to proceedings in execution of decree, dissented from ... 37

" " " " *Appellate Court—Appeal of one defendant—Decree in favour of plaintiff-respondent who has not appealed, against another respondent—Civil Procedure Code, Sections 544 and 561.*—There is no rule of procedure which would justify an Appellate Court on the appeal of one defendant in decreeing in favour of a plaintiff-respondent against another respondent, who was also a defendant in the first Court, in the absence of any appeal or cross-objection by the plaintiff filed in the Appellate Court.

The general rule is that an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal: the Code of Civil Procedure provides at least two exceptions to this rule which are contained in Sections 544 and 561 of the Code ... 46

" " " " *Civil Procedure Code 1882, Section 629—Review of review—Competency of.*—The language of the last paragraph of Section 629, Civil Procedure Code, 1882, that "No application to review an order passed on review or on an application for a review shall be entertained" forbids any application for review of an order admitting or rejecting an application for review or of the judgment arrived at after a re-hearing of the case under Section 630, whether that judgment affirms or varies the previous judgment, and though, in either case, it is followed by a new decree: in other words a review of a review is not competent.

The word "order" in the clause referred to is apparently not used in a technical sense as opposed to a decree, but as a comprehensive term to express the final adjudication of the Court after the application for review has been admitted and the case re-heard and includes both the judgment and the decree ... 57

" " " " *Striking out defence of defendant—Circumstances justifying such an order—Jurisdiction of Court of Political Agent, Bhopal—Jurisdiction of British Court to make decree affecting immoveable property out of British India.*—In a suit for partition and possession of a one-third share of property, moveable and immove-

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able, including cash and choses in action, the Court of first instance, being of opinion that issues could not be properly settled until defendants 1, 2 and 3 produced their books, which the Political Agent of Bhopal reported could not be spared, directed defendant 1 to file a written statement setting forth in detail the entire joint property, moveable and immoveable, and in the case of trading firms a balance sheet for each showing how they stood on the date of suit.

Defendant 1 failed to comply with this order, although the suit was adjourned from time to time to enable him to do so, and eventually the Court struck the three defendants' defence off the record and directed the plaintiff to produce *ex-parte* proof against them.

Plaintiffs produced evidence accordingly and the Court gave him a decree for—

- (a) Possession by partition of one-third share of immoveable property in the Karnal District, and of the immoveable property situate at Sehore (Bhopal State);
- (b) Certain cash and outstandings; and
- (c) Rupees 1,95,487-9-5 to be paid by defendants 1, 2 and 3.

Held, that the order striking the defence off the record was not justified by law and that the suit must be remanded.

The statement required by the Court was not one of the nature prescribed by Section 114, Civil Procedure Code, which is as much as possible to be confined to a simple narrative of the facts, which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove. Here, the defendants had put in their defence and the Court did not wish them to supplement it in any way by a further statement of facts which they might believe to be material to their case. Section 113, Civil Procedure Code, therefore did not justify the order.

Nor was the order justified by Section 136, Civil Procedure Code. The document called for by the Court was neither in the possession nor in the power of the defendants and was not even in existence. Section 130 refers to documents which are *in esse* and not to documents which the Court desires to be brought into existence. Further, there is no power conferred by Section 136, or elsewhere, to strike out the defence of a defendant of its own motion, and in the absence of an application to that effect by the plaintiff (*Cf. Punjab Record*, No. 80 of 1889).

Observations as to the power of the Court to punish defendants for contumacious behaviour and to ensure the speedy disposal of suits.

Held, also, that the Court of the Political Agent, Bhopal, whatever its jurisdiction may be, was not one of the nature referred to in Section 12, Civil Procedure Code, not being established by the authority of the Governor-General in Council and Bhopal not forming part of British India.

Quære.—Whether the District Judge, Delhi, had jurisdiction with regard to the immoveable property situate and business conducted in foreign territory

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Civil Procedure Code (Act XIV of 1892),—Dharmasala—Right of worshipper at, to contest alienation of property attached to—Application of Section 539,

The references are to the Nos. given to the cases in the "Record."

No.

Civil Procedure Code (Act XIV of 1892).—Section 13, Explanation II, Civil Procedure Code, 1882—Res judicata—Matter which ought to have been made ground of defence in former suit.—Section 13, Explanation II, Civil Procedure Code, 1882, which provides that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit, does not further declare that such matter shall be deemed to have been heard and finally decided.

The Explanation was not intended to enable a party to treat a point as having been decided in his favour in a former suit which was in fact not so decided. It applies rather to a case where the defendant has a defence which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward the suit was decreed against him

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" " " " " *Section 622—Order under Section 108 of the Code setting aside an ex-parte decree—Revision.—An application was made to revise an order made under Section 108, Civil Procedure Code, setting aside an ex-parte decree, such order being made nearly seven years after the date of the decree.*

Held, following Punjab Record, No. 114 of 1883, that no application under Section 622 of the Code would lie. The suit was one in which an appeal would lie, and by the word "case" the whole suit is meant.

125

" " " " " *Chapter III—Misjoinder—Trespass—Separate and independent acts of defendants.—Seventeen of the village proprietors sued thirty-six persons—co-sharers and non-proprietors—for a declaration that the defendants were not entitled to enclose certain lands of the village or to erect buildings thereon, and also praying for the demolition of the buildings so erected and restoration of the land to its original condition.*

The building by each defendant was his separate and independent act.

Held, on further appeal (the objection was taken in the Court of first instance) that the suit was bad for misjoinder.

[Cf., I. L. R.; 14 Calc., 435]

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" " " " " *Section 549—Security for costs—Recovery of costs from surety in execution or by separate suit—Liability of surety if decree against principal debtor is barred by limitation.—A. J. was plaintiff-appellant in an appeal pending in the High Court at Allahabad and was required under Section 549, Civil Procedure Code, to give security for the costs of the appeal. Pursuant to that order, A. J. tendered a security bond, dated 8th September 1881, by which A. S. (defendant in the present suit) agreed to be responsible to the extent of Rs. 1,400, hypothecating a haveli situate at Sujampur in the Gurdaspur District to secure the said sum.*

On 5th April 1882, A. J.'s appeal to the High Court was dismissed with costs; and on 23rd June 1890, the defendant-respondent in that appeal filed a suit against A. S. for recovery of Rs. 1,400 on the instrument of 8th September 1881, execution of the High Court decree for costs against A. J., the principal debtor, having meanwhile become barred by limitation.

The references are to the Nos. given to the cases in the "Record."

No

Held, following *Punjab Record*, No. 109 of 1886, that at the date of the High Court decree the plaintiff had no remedy against the defendant (the surety) except by regular suit, and such remedy was not impaired by the fact, that in 1888 the Legislature altered the law by providing a remedy by way of execution, which, but for the law of limitation, would have been available to the plaintiff after Act VII of 1888 became law, the rule that pending proceedings are generally governed by any change in the law of procedure not being extendible to substantive rights.

Held, also, that A. S. was not discharged from liability by reason that the right of the plaintiff in the present suit to execute the decree for costs against A. J. was barred by limitation ... 136

Civil Procedure Code (Act XIV of 1892).—Section 13. Explanation II—Ground of defence or attack in former suit—Parties litigating under the same title.—The widow of one K. B. sued K. B.'s brother (G. H.) and daughter for her deceased husband's share of the estate for her life, and obtained a decree for half the property. While the above suit was pending G. H. died, and the present plaintiff, who was K. B.'s son-in-law, was brought on the record (with others) as G. H.'s legal representative, but was not allowed by the Court to put forward any claim of his own as K. B.'s khanadamad in answer to the widow's claim. Subsequently, the said plaintiff sued the widow and daughter of K. B. for K. B.'s estate as his heir and khanadamad.

Held, that the suit was not barred as *res judicata* under Explanation II, Section 13, Civil Procedure Code, by reason of the previous decision as the plaintiff was not litigating under the same title in the two suits, and moreover his title to succeed as K. B.'s khanadamad was properly rejected as a ground of defence in the previous litigation ... 142

Club.—Unregistered Association—Personal liability of Secretary of Managing Committee, who was also a Member thereof and a depositor in the Association.—B. guaranteed the honesty of his brother who was appointed Manager of the Sind, Punjab and Delhi Railway Co-operative Stores, which was an unregistered private association of the nature of a Club. B. further deposited Rs. 3,000 under the guarantee.

In a suit by B. against S., who was, at the time of the contract, a depositor in the association, a Member of the Managing Committee and also its Secretary, for a refund of portion of his guarantee deposit, *held*, that S. was personally liable, either as a sole promisor, or as a joint promisor (Section 43, Contract Act), and that a suit against him would lie ... 11

Common Land.—Joint owners—Erection of building by one on common land—Absence of special damage to others.—The defendant, who was a proprietor in Gohana (Rohtak District), erected a pakka building upon a portion of the *abadi*—208 yards in extent—or common property of the village. The building was commenced within a very few months before suit, and was immediately objected to by at least one of the plaintiffs. It was completed in spite of the plaintiffs' protests and appeal to the Revenue authorities, at or about the date when the present suit was launched. The defendant spent Rs. 1,000 or thereabouts upon the building, which was adjacent to, if not built on to, his own house. No acquiescence on the plaintiffs' part was established.

The references are to the Nos. given to the cases in the "Record."

No.

The plaintiffs, sixteen proprietors of Gohana, sued to have the building demolished. They did not succeed in proving any substantial damage from the building, over and above the fact that defendant had probably monopolized a larger share of this particular portion of the common land than would fall to him at a division.

Held, that the plaintiffs' appeal must be dismissed upon the ground that it not being satisfactorily established that any substantial mischief had accrued to the plaintiffs from the completed building erected at considerable expense, the lower Court had exercised a wise discretion in refusing to order its demolition

54

Compensation for improvements.—Pre-emption—Compensation for improvements made by original purchaser—Form of decree.—The practice of the Court to award compensation for improvements to a vendee who has made them in good faith, or who may appear to be equitably entitled to it, followed and affirmed.

Punjab Record, Nos. 34 of 1875, 74 of 1875 and 38 of 1889, referred to.

Per BULLOCK, J.—The decree in such cases should provide separately for the payment of the pre-emption money and the payment of compensation, and that payment of the former within the time fixed in the decree should save the decree from forfeiture, though the compensation be not paid. (Cf. Section 214, Civil Procedure Code)...

91

Compromise of suit.—See *Civil Procedure Code*.

Continuing wrong.—See *Custody of wife*.

Contract Act, 1872.—Unregistered Association—Personal liability of Secretary of Managing Committee, who was also a Member thereof and depositor in the Association.—B. guaranteed the honesty of his brother who was appointed Manager of the Sind, Punjab and Delhi Railway Co-operative Stores, which was an unregistered private Association of the nature of a Club. B. further deposited Rs. 3,000 under the guarantee.

In a suit by B. against S., who was, at the time of the contract, a depositor in the Association, a Member of the Managing Committee and also its Secretary, for a refund of portion of his guarantee deposit, *held*, that S. was personally liable, either as a sole promisor, or as a joint promisor (Section 43, Contract Act), and that a suit against him would lie

11

" " *Marriage brocage contract—Void agreement—Guarantee.*—S. betrothed his minor daughter to the plaintiff's son, who was also a minor, and N. the brother-in-law of S. entered into an agreement with the plaintiff's father by which he guaranteed that S. should celebrate a marriage between the boy and girl after the expiration of five and before the expiration of eight years. S. married his daughter elsewhere and the plaintiff sued N. for damages.

The plaintiff's father D. betrothed his marriageable daughter to N. receiving Rs. 1,200 from him; the marriage took place shortly after the betrothal. S. agreed to give his infant daughter to the plaintiff's son, and N. guaranteed the performance of S.'s undertaking.

The Divisional Judge held the agreement to be a contract of guarantee.

Held, that there was no enforceable agreement of guarantee: the agreement was entirely for the benefit and satisfaction of N. himself

The references are to the Nos. given to the cases in the "Record."

	No.
and his promise was <i>nudum pactum</i> . He could in fact do nothing more than endeavour to induce S. to marry his daughter to the plaintiff's son, and if the parties contemplated that he should purchase S.'s consent, such an undertaking on his part would be void according to the view expressed in the Full Bench decision reported as <i>Punjab Record</i> , No. 128 of 1889	112
Court Fees Act, 1870. — <i>Suit for account—Value of relief sought—Jurisdiction—Course of appeal—Authority of Appellate Court disclaiming jurisdiction, to order payment of additional Court Fee.</i> —The plaintiff sued the defendant for an account valuing the relief sought at Rs. 100, and expressing his willingness to pay the Court Fee due upon any sum decreed in excess of this amount in accordance with the provisions of Section 11, Court Fees Act, 1870.	
After the defendant had produced the books containing the parties' accounts and a commission had examined the same, the plaintiff filed a petition stating that he appeared to be <i>prima facie</i> entitled to recover a sum over Rs. 12,000, and praying that the matter might be fully investigated. No amendment of the plaint was, however, either asked for or ordered, and the suit eventually resulted in a decree in the plaintiff's favour for Rs. 2,343.	
The plaintiff then appealed for a further sum of Rs. 1,716 and the defendant, against the decree in the plaintiff's favour, for Rs. 2,343.	
Both parties presented their appeals to the Divisional Judge, who held that the appeals lay to the Chief Court.	
<i>Held</i> , that the appeals lay to the Divisional Judge : under Section 7, clause (iv) of the Court Fees Act, the valuation of the original suit for purposes of Court Fee is fixed at the amount at which the relief sought is valued in the plaint. This, in the present case, was Rs. 100 and the amount was never altered by any amendment of the plaint ; and under Section 8, Suits Valuation Act, 1887, the value of a suit for an account as determinable for the computation of Court Fees and the value for purposes of jurisdiction shall be the same.	
The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisional Court under Section 39, Punjab Courts Act (as amended).	
<i>Semle.</i> —If an Appellate Court has no jurisdiction to hear an appeal, it is not competent to it to pass orders for the payment of any additional Court Fee which it considers should have been levied in the first Court.	
[<i>Cf. Punjab Record</i> , No. 40 of 1892]	86
" " " <i>Section 29—Amendment of document—Fresh suit.</i> —The plaintiff sued in a Revenue Court for (1) value of produce, and (2) value of trees.	
The Revenue Court decided the suit as regards the produce, referring the plaintiff to the Civil Courts as regards the value of the trees.	
The plaintiff sued in the Civil Courts accordingly, filing his plaint on unstamped paper.	
<i>Held</i> , that Section 29, Court Fees Act, 1870, did not operate to exempt the second plaint from payment of the usual Court fees	132

The references are to the Nos. given to the cases in the "Record."

No.

Criminal Procedure Code, 1882.—Sections 133 and 137—Public place—Right to sue for declaration of rights in Civil Court.—Notwithstanding the words in Section 133, Criminal Procedure Code, 1882: "No order duly made by a Magistrate under this section shall be called in question in any Civil Court," it is open to a person who claims to be the sole proprietor of land, with reference to which a Magistrate has made a conditional order under the said section treating it as a "public place," which conditional order has, in due course of law, been made absolute under Section 137 of the Code, to sue the opposite party in the Civil Court for a declaration of his rights in such land.

Punjab Record, No. 94 of 1889, overruled ... 34

Custody of wife.—Husband undergoing sentence of transportation for life at Port Blair—Equity and good conscience.—The lower Appellate Court gave the plaintiff, a Jat of the Jullundur District, who was undergoing a sentence of transportation for life at the penal settlement of Port Blair in the Andaman islands, a decree for the custody of his wife.

Held, that the decree should not have been made and must be reversed, it not being in accordance with the principles of equity and good conscience that a young woman, who had hardly attained maturity when her husband was transported for life, should be directed to proceed to a penal settlement and co-habit with him there.

47

" *Suit for custody of wife—Third persons harbouring wife—Continuing wrong—Indian Limitation Act, 1877, Section 23.*—A third person who harbours a runaway wife is guilty of a continuing wrong, and under the operation of Section 23, Indian Limitation Act, 1877, a fresh period of limitation begins to run at every moment of time during which the wrong continues, the section being more comprehensive in this respect than the corresponding provision of the Act of 1871.

The limitation applicable to a suit by a husband for the custody of his wife is to be found in Articles 34, 35, Schedule II, Limitation Act, 1877.

Punjab Record, No. 60 of 1879, (F. B.) followed ... 80

" *Suit for custody of wife—Mussalman Gujars—Discretion of Court.*—The plaintiff, a minor, sued through his father for custody of his wife.

The plaintiff was about ten years of age and the principal defendant, who was a widow, about thirty. It was alleged that the marriage took place when the plaintiff was four and the woman between nineteen and twenty-four.

Held, assuming the plaintiff to have become the husband of the woman, that the Court had a discretion to grant or refuse the order prayed for, and the order ought in the present instance to be refused.

[*Cf. Punjab Record, No. 47 of 1892.*] ... 128

Custom, Adoption—Appointment of heir—Sonless proprietor—Hindu Jats, Tank gôt, Sonapat tahsil, Delhi District.—M. S., a childless proprietor and an old man, wished to appoint M., a collateral related in the fourth degree from the common ancestor, as sole heir to his property to the exclusion of his other heirs, who were related in the same degree as M.

The references are to the Nos. given to the cases in the "Record."

No.

M. S. executed and registered a deed in which he recited that he had adopted M. and gifted him his land. He further made some sort of declaration before the brotherhood, accompanied probably by some simple ceremonies for the purpose of giving publicity to his already expressed intention to make M. his heir.

M. was about twenty years of age at the time and up to this period he had not been brought up as a son by M. S., nor had he lived with him or been married by him, but after the deed was executed M. resided with M. S., who died very shortly afterwards.

The parties were Hindu Jats (Tank gôt) of the Sonepat tahsil, Delhi District.

Found, that the adoption or appointment of M. as heir of M. S., was valid by custom 4

Custom, Adoption—Agriculturists—Customary adoption of the Punjab—Succession of collateral heirs in his natural family of person adopted, in default of lineal descendants.—Held, by the Full Bench, that there is no general custom prevalent amongst agriculturists in the Punjab by which the collateral heirs, in his natural family, of a man who has been adopted under a customary adoption succeed in default of his lineal heirs, to the property which he acquired or inherited by virtue of his adoption.

Not only is there no such general custom, but such a succession is quite opposed to the general principles which regulate the succession to land in the village communities of the Punjab 12

" " *Sister's son—Lodi Pathans, Jullundur District—Found*, that amongst the Lodi Pathans of the Jullundur District a sonless proprietor cannot adopt his sister's son.

The parties being agriculturists were governed by custom and not by Muhammadan law 21

" " *Bhullar Jats, Lahore District.—Found*, that the custom of Bhullar Jats of the Lahore District does not sanction the adoption of a person of a *ghair kaum* 69

" " *Arains of tahsil Nakodar, Jullundur District.—Found*, in a suit the parties to which were Arains of tahsil Nakodar in the Jullundur District, that no custom was proved authorising the adoption of a wife's brother's son, the burden of proof being upon those setting up such adoption 75

" " *Ghair kaum—Kalwal Jats (Muhammadans), tahsil Kharian, Gujrat District.—Found*, in a suit the parties to which were Kalwal Jats (Muhammadans) of the Kharian tahsil of the Gujrat District, that no custom was proved recognising the adoption of a person of a *ghair kaum*, such as wife's brother's son 81

" " *Jats of Jaj gôt, Hoshiarpur tahsil—Gift to or adoption of step-son of another gôt.—Found*, in a suit the parties to which were Jats of the Jaj gôt in the Hoshiarpur tahsil (the alleged donee or adopted son being however of a different gôt), that no custom was proved authorising a gift of ancestral land to a step-son in the presence of near collaterals or the adoption of such son by his step-father, the burden of proof in either case being upon those seeking to maintain the gift or adoption 83

The references are to the Nos. given to the cases in the "Record."

	No.
<i>Custom, Adoption—Person adopted of different gôt.—Found, in a suit the parties to which were Jaj Jats of the Hoshiarpur tahsil, that no custom was established permitting the adoption of a person of a different gôt—a step-son; or a gift of land to him in presence of near collaterals descended from the donor's father.</i>	
<i>Punjab Record, No. 156 of 1890, referred to</i> ...	98
" " <i>Indian Limitation Act, 1877, Schedule II, Article 118—Suit to declare an adoption invalid or as having never in fact taken place.—Semble.—The "alleged adoption" mentioned in Schedule II, Article 118, Limitation Act, 1877, must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiff or challenged as being invalid upon some ground of law or custom, which does not go the length of asserting that the adoption as an adoption, is wholly impossible</i> ...	144
<i>Custom, Alienation—Sindhu Jats, Amritsar District—Collaterals in eighth degree.—Found, that by the custom of the Sindhu Jats of the Amritsar District, collaterals of the eighth degree were not entitled to contest an alienation of his ancestral estate made by a childless proprietor as being made without necessity or consideration.</i>	
<i>Punjab Record, No. 56 of 1890, referred to</i> ...	9
" " <i>Widow—Kakezais of Naushera, tahsil Pasrur, Sialkot District—Distinction between power of gift and bequest.—Found, that among Kakezais of the village of Naushera in tahsil Pasrur of the Sialkot District, a widow was empowered to make a valid will in favour of her daughter's children. But independently of the mother's act, daughters were entitled to succeed under the provisions of their father's will.</i>	
<i>Semble.—It is not correct to say that, in all cases, no distinction is ever recognised between the power of gift inter vivos and the power of bequest by will</i> ...	10
" " <i>Gift by widow—Compliance with conditions by donee—Gujars of Kharian tahsil, Gujrat District.—Found, that among Mussalman Gujars of the Kharian tahsil, Gujrat District, the power of alienation by gift possessed by a widow is strictly limited, and that unless the donee can prove that he has complied with the conditions which would validate the gift, such as that he has in fact maintained her, the alienation is invalid.</i>	
<i>Punjab Record, No. 8 of 1891, referred to</i> ...	14
" " <i>Tarkhans of the Jhelum District—Gift by sonless man to one heir without consent of the others.—Found, that by the custom governing Tarkhans in the Jhelum District, a sonless man is competent to make a gift of ancestral immoveable property to one heir without the consent of the rest, the heirs being a brother and another brother's sons.</i>	
<i>Punjab Record, No. 109 of 1891, and No. 34 of 1883, referred to</i> ...	22
" " <i>Gift in presence of collaterals—Brahmins of mauza Bupka, tahsil Jagadhri.—Found, in a suit the parties to which were Brahmins of mauza Bupka in the Jagadhri tahsil of the Umballa District, that an alienation by way of gift was invalid in the presence of collaterals</i>	24
" " <i>Gift to stranger in presence of nephews—Gathwal Jats, Delhi District.—Found, that by the custom of the Gathwal Jats of the Delhi District, a gift to a stranger of ancestral land in the presence of nephews is invalid</i> ...	25

The references are to the Nos. given to the cases in the "Record."

- Custom, Alienation—Gift to daughters in presence of near male collaterals—Sayads (Sunnis) of Unchagaon of Balabgarh tahsil, Delhi District.**—In a suit the parties to which were Sayads (Sunnis) of the village of Unchagaon in the Balabgarh tahsil of the Delhi District, found that the defendants (two daughters), upon whom the burden of proof lay, had failed to establish that by custom (it being admitted that the daughters had no right by *inheritance*) a gift of ancestral land made in their favour by their father, a sonless proprietor, in the presence of male collaterals descended from the grandfather of the donor, without their consent, was valid 32
- " " **Childless proprietor—Gujars of Hoshiarpur tahsil—Burden of proof.**—Found, in a suit the parties to which were Gujarars of Hoshiarpur tahsil, that no custom was established justifying an alienation by a childless proprietor to two nephews in the presence of other nephews,—the onus being upon the alienees to establish the custom.
- Per RIVAZ, J.**—In cases raising important issues of custom, it is desirable that Courts of first instance should, before deciding as to the burden of proof, call for evidence from both sides and defer adjusting the question of onus until all possible information has been obtained from either party 35
- " " **Awans of Rawalpindi—Childless proprietor—Gift to grand-nephew in presence of brother—Burden of proof.**—Found, that among Muhammadan Awans of the Rawalpindi District, a childless proprietor is not competent, in presence of a brother, to convey his whole estate by gift to his grand-nephews.
- Semle.**—In adjusting the burden of proof in such an alienation, the same rule applies as if the case had occurred in a part of the Province in which the Full Bench Ruling, *Punjab Record*, No. 107 of 1887, is to be regarded 52
- " " **Sale without necessity to collateral—Burden of proof.**—A childless proprietor sold his land to the plaintiff, a collateral relation who lived with him, and then died. The plaintiff sued the other collaterals, who, like himself, would be entitled to inherit along with him but for the sale, to recover possession of the land.
- Held,** that the alienation without necessity was bad by custom and that the burden of proof was upon the plaintiff to support the sale ... 53
- " " **Childless proprietor—Goraya Jats, tahsil Ajnala, Amritsar District.**—Found, in a suit the parties to which were Goraya Jats of tahsil Ajnala, Amritsar District, that a mortgage—which was held to be in fact a purely colourable transaction—by a childless proprietor in favour of a nephew in the presence of other near collaterals was not authorized by custom.
- The onus of establishing the validity of the alienation was upon those setting it up, within the general principles explained in *Punjab Record*, No. 107 of 1887 61
- " " **Sonless Gujar proprietor—Gurdaspur District—Gift to sister's sons—Collaterals in fourth degree.**—Found, that a gift of land by a sonless Gujar proprietor of the village of Garhmal in the Gurdaspur District, in favour of his sister's sons, was invalid by custom in the presence of collaterals in the fourth degree 65

The references are to the Nos. given to the cases in the "Record."

No.

Custom, Alineation—Right to sue—Suit to contest alienation on ground of relationship—Failure to prove allegation—Enquiry as to plaintiffs' rights as ultimate heirs.—The plaintiffs sued on the allegation that they were collateral heirs of S. S. in the fifth degree. The lower Appellate Court, while agreeing with the Court of first instance that the plaintiffs had failed to establish any definite relationship to S. S., remanded the suit for an inquiry as to whether plaintiffs were not entitled to sue as the ultimate heirs, being members of the same gôt as S. S., and therefore presumably descended from a common ancestor and also being proprietors in the same division of the village. Ultimately it was decided that the plaintiffs could sue as being of the same gôt and patti as S. S.

Held, that the decree of the lower Appellate Court must be reversed. No distinct relationship to S. S., and no custom entitling them to sue upon the grounds set up on their behalf by the Appellate Court was established by the plaintiffs.

Punjab Record, No. 78 of 1888, referred to and distinguished ... 68

" " *Childless proprietor—Sindhu Jats, mauza Sindhwan, Jullundur District—Illegitimacy.*—*Found*, in a suit the parties to which were Sindhu Jats of the village of Sindhwan, tahsil Nawashahr, Jullundur District, that no custom was proved conferring on a childless proprietor an unrestricted power of alienation of ancestral land in the presence of nephews.

The sons of the deceased, their mother being the wife of another man, must be deemed to be illegitimate.

Punjab Record, No. 84 of 1889 and No. 49 of 1890, referred to ... 72

" " *Gift by mother of last male owner—Sayads and Pathans of Basti Baba Khel, Jullundur District.*—*Found*, in a suit the parties to which were Sayads, or possibly Pathans, settled in the village or kasba of Basti Baba Khel in the Jullundur District, not agriculturists in the strict sense of the term (their ancestors being said to have been horse dealers), that a presumption existed in favour of the right of collaterals in the ninth degree from the last male owner to contest a gift by the said owner's mother (who had been recorded as proprietor of half the estate on the death of her son, the other half going to his widow) in favour of a son of her late husband's sister, and that the donor and donee had failed to rebut the presumption ... 74

" " *Will—Nun Mussalman Jats, tahsil Bhakkar, Dera Ismail Khan District.*—*Found*, in a suit the parties to which were Nun Mussalman Jats of the Bhakkar tahsil of the Dera Ismail Khan District, that no custom was established authorising the bequest of land in favour of a daughter and her sons ... 76

" " *Gift to grandsons to exclusion of son—Sindhu Jats, tahsil Moga, Ferozepore District.*—*Found*, in a suit the parties to which were Sindhu Jats of the Moga tahsil of the Ferozepore District, that no custom was established empowering an owner of ancestral property to make a gift of half of his land and a house to his grandsons—the children of his only son, who had two wives, by each of whom he had male issue, the donees being the children of one of the wives—to the exclusion of their father, the donor's son ... 82

The references are to the Nos. given to the cases in the "Record."

	No.
<i>Custom, Alienation—Jats of Jaj gôt, Hoshiarpur tahsil—Gift to or adoption of step-son of another gôt.—Found</i> , in a suit the parties to which were Jats of the Jaj gôt in the Hoshiarpur tahsil (the alleged donee or adopted son being however of a different gôt), that no custom was proved authorising a gift of ancestral land to a step-son in the presence of near collaterals, or the adoption of such son by his step-father, the burden of proof in either case being upon those seeking to maintain the gift or adoption	83
" <i>Right of near female collateral—Kanwali Arains of Lahore District—Meaning of aulad.—Found</i> , in a suit the parties to which were Kanwali Arains of the Lahore District, that by custom a near female collateral was not competent to object to a sale of land and houses by the deceased owner's widow.	
Observations as to the meaning of the term <i>aulad</i>	89
" <i>Ancestral land—Necessity: antecedent debt—Sonless Brahmin, Hoshiarpur District—Burden of proof.—In</i> a suit by the collaterals (brother's sons) of a deceased sonless Brahmin of the Hoshiarpur District to contest a mortgage of land made by him upon the ground of absence of valid necessity for the alienation, <i>held</i> :	
<i>Per</i> STODDON, J.—It is incumbent on a sonless proprietor to pay his debts, and if he raises money in order to discharge them he raises it for a necessary purpose.	
What is valid necessity may be another question of custom, some tribes construing the term much more widely than others.	
<i>Per</i> BULLOCK, J.—The payment of a debt proved to be in existence and recoverable by law is a sufficient justification for the raising of money to pay it through an alienation of ancestral land by a childless proprietor, but it follows as a sound deduction from the Full Bench Ruling, <i>Punjab Record</i> , No. 107 of 1887, that the last creditor lending upon the security of ancestral land must satisfy himself of the necessity for the previous debts for the payment of which the proprietor borrows.	
<i>Punjab Record</i> , No. 107 of 1887, referred to.	
[OPINION OF PLOWDEN, J., in admitting the appeal, as to the necessity which will justify a valid disposition of his property by a childless proprietor.]	90
" <i>Gift to daughter's son in presence of nephew—Khatri of Ahmadpur, tahsil Sherkot, Jhang District.—Found</i> , that a gift by a sonless Khatri of a village in the Sherkot tahsil of the Jhang District, of ancestral immoveable property, in favour of his daughter's son, was invalid by custom in the presence of a nephew of the donor	93
" <i>Gift by sonless proprietor to step-sons—Hindu Bhains Jats of the Jullundur District.—Found</i> , that in a village of Bhains in the Nawashahr tahsil of the Jullundur District, a gift by a sonless proprietor, a Hindu Jat of the Bhains gôt, to his step-sons, was sufficiently justified by custom.	
<i>Held</i> , also, that considering the various castes of which the proprietary body was now composed and the number of gifts that had been made to relations without objection, it was for the plaintiffs to prove that the alienation to step-sons was inadmissible by custom, and that they had failed to discharge the onus.	
<i>Punjab Record</i> , No. 107 of 1887, referred to	95

The references are to the Nos. given to the cases in the "Record."

	No.
Custom, Alienation—Gift to daughter whose husband is a resident son-in-law—Mussalman Jats of tahsil Phalian, Gujrat District. —The course of decisions, that among Muhammadan Jats and Gujars of the Gujrat District—whose customs in this respect appear to be identical—gifts to daughters whose husbands are <i>khanadamads</i> , are permitted, but not gifts to daughters whose husbands do not answer the above description, referred to and followed.	
Punjab Record , Nos. 39 of 1887 and 109 of 1891 referred to	96
" Gift to stranger of remaining ancestral property—Childless Gujar of Rawalpindi District. — <i>Found</i> , that no custom was proved by which a childless Gujar of the Rawalpindi District could make a valid bequest of all his remaining ancestral property in favour of a stranger, an Awan, in the presence of a son of the donor's brother's son	97
" Gift by childless proprietor of a portion of undivided ancestral land to brother's son and brother's grandson—Jhurars of Sirsa tahsil. — <i>Found</i> , that a gift of a portion of undivided ancestral land by a childless Jhurar Jat (Mussalman) of mauza Chora Khera, in the Sirsa tahsil, to his brother's son and brother's grandson was valid by custom in the presence of a brother and nephew of the donor	101
" Absence of necessity—Childless proprietor—Arains, Lahore District. — <i>Found</i> , in a suit the parties to which were Arains of the Lahore District, that a childless proprietor is subject to the ordinary rule restricting alienation to cases of necessity, and that the alienation in the present case was therefore invalid	104
" Khanadamad—Appointment of, to succeed to estate of sonless proprietor—Arains of tahsil Zira, Ferozepore District. — <i>Found</i> , in a suit the parties to which were Arains of tahsil Zira in the Ferozepore District, that according to the custom of the tribe a <i>khanadamad</i> may be appointed to succeed to the estate of a sonless proprietor to the exclusion of his brother and nephews	107
" Childless proprietor—Gift to son-in-law—Mahtons of mauza Bham, tahsil Garshankar, Hoshiarpur District. — <i>Found</i> , in a suit the parties to which were Mahtons (Hindus) of the village of Bham in the Garshankar tahsil of the Hoshiarpur District, that there was a presumption against the validity of a gift by a sonless proprietor to his son-in-law, and that the presumption had not been rebutted.	
Punjab Record , No. 75 of 1891 and No. 14 of 1892, referred to	117
" Gift by childless Gujar of tahsil Gujrat to step-son. — <i>Found</i> , in a suit the parties to which were Gujars of mauza Dittawal, tahsil and District Gujrat, that a childless proprietor was not authorised by custom to make a gift of his land to his step-son in presence of sons of the donor's brothers.	
Punjab Record , No. 39 of 1887, and Nos. 8 and 109 of 1891, referred to	120
" Gift to daughters by sonless proprietor.—Rights of brother of donor—Muhammadan Gujars, tahsil Kharian, Gujrat District. — <i>Found</i> , in a suit the parties to which were Muhammadan Chuhani Gujars of tahsil Kharian in the Gujrat District, that a gift of all his land by a sonless proprietor to his daughters in the presence of a brother of the donor was invalid by custom.	
Punjab Record , No. 106 of 1886 and No. 39 of 1887, referred to	122

The references are to the Nos. given to the cases in the "Record."

	No.
Custom, Alienation—Sale without necessity to sister's sons—Gondals of tahsil Phalian, Gujrat District.—Found, that a Gondal of tahsil Phalian, Gujrat District, was not entitled by custom to make a sale of his land, without necessity, to his sister's sons in the presence of his brother's sons. <i>Punjab Record, No. 8 of 1891, referred to</i>	129
" " Childless proprietor—Sayads of town of Gujrat owning land in adjacent villages.—Found, in a suit the parties to which were Sayads of the town of Gujrat, owning land in the villages attached thereto, that no custom was established by the defendants—upon whom the onus lay—permitting the alienation of ancestral immoveable property save for necessity	133
" " Unequal distribution of ancestral land between sons and son's sons—Jats of tahsil and District Hoshiarpur.—Found, in a suit the parties to which were Jats of Nangal Ishar, tahsil and District Hoshiarpur, that:	
(n) the onus of proving a custom empowering a father to make an unequal distribution of his ancestral holding was on the person relying on such a custom; and	
(b) that the defendants, who relied on such a power, had failed to establish it.	
<i>Punjab Record, No. 164 of 1884, and Nos. 7 and 115 of 1891, referred to</i>	138
Custom, Evidence.—Wajib-ul-arz—Evidence—Modification of custom.—The parts of a <i>Wajib-ul-arz</i> referring to custom are not provisions intended to be in force for a limited period only,—they are statements that a certain custom exists. The statement may or may not be correct, but if it is correct, there would be a natural presumption that the custom continued to exist, and it would be for those alleging that a change had subsequently taken place to prove the allegation.	
The production of a later Record of Rights containing entries opposed to the earlier one, would no doubt be some proof of such a change, but there would then merely be a balance of evidence on either side; it could not be said that the second Record destroyed or abrogated the earlier one.	
<i>Punjab Record, No. 107 of 1887, referred to...</i>	8
" " Alienation—Childless proprietor—Gujars of Hoshiarpur tahsil.—Burden of proof.—Found, in a suit the parties to which were Gujars of the Hoshiarpur tahsil, that no custom was established justifying an alienation by a childless proprietor to two nephews in the presence of other nephews,—the onus being upon the alienees to establish the custom.	
<i>Per RIVAZ, J.—In cases raising important issues of custom, it is desirable that Courts of first instance should, before deciding as to the burden of proof, call for evidence from both sides and defer adjusting the question of onus until all possible information has been obtained from either party</i>	35
" " Awans of Rawalpindi—Childless proprietor—Gift to grand-nephew in presence of brother.—Burden of proof.—Found, that among Muhammadan Awans of the Rawalpindi District a childless proprietor	

The references are to the Nos. given to the cases in the "Record."

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is not competent, in presence of a brother, to convey his whole estate by gift to his grandnephews.

Semble.—In adjusting the burden of proof in such an alienation, the same rule applies as if the case had occurred in a part of the Province in which the Full Bench Ruling *Punjab Record*, No. 107 of 1887, is to be regarded 52

Custom, Evidence—Sale without necessity to collateral—Burden of proof.—A childless proprietor sold his land to the plaintiff, a collateral relation who lived with him, and then died. The plaintiff sued the other collaterals, who, like himself, would be entitled to inherit along with him but for the sale, to recover possession of the land.

Held, that the alienation without necessity was bad by custom and that the burden of proof was upon the plaintiff to support the sale ... 53

" *Whole and half blood—Pagwand or Chundawand—Sheikhs of mauza Saman, tahsil Attock.*—*Found*, in a suit between the whole and the half blood, the parties to which were Sheikhs of Mauza Saman, tahsil Attock, Rawalpindi District, descended from a Hindu ancestor who became a convert to Islam some six or seven generations back, that the custom of the family being found to be *pagwand*, the burden of proof that the whole blood excluded the half blood in succession to a deceased brother lay upon the defendant, the full brother of the deceased, and had not been discharged.—*Punjab Record*, No. 4 of 1891, referred to 58

" *Alienation—Childless proprietor—Goraya Jats, tahsil Ajnala, Amritsar District.*—*Found*, in a suit the parties to which were Goraya Jats of tahsil Ajnala, Amritsar District, that a mortgage—which was held to be in fact a purely colourable transaction—by a childless proprietor in favour of a nephew in the presence of other near collaterals, was not authorized by custom.

The onus of establishing the validity of the alienation was upon those setting it up, within the general principles explained in *Punjab Record*, No. 107 of 1887 61

" *Succession—Moghuls of Kharkhodah, Rohtak District—Sister and sister's sons—Burden of proof.*—*Found*, in a suit the parties to which were the descendants of a common ancestor, a Moghul resident in the village or kasha of Kharkhodah in the Rohtak District, that it was proved that, by the custom of the village, a sister and a sister's son excluded descendants of the deceased's grandfather.

Held, also, that the burden of proof lay in the first instance on the sister and sister's sons claiming in opposition to the male issue of the grandfather; but that they had made out a *prima facie* case shifting the onus to the other side.

As a general rule, by agricultural custom, females or the issue of females do not inherit ancestral land. Occasionally, daughters and daughters' sons do inherit after their father in the absence of sons. More rarely, sisters and their issue inherit after brothers. The right to succeed of females and their issue when it exists, generally exists only in presence of remote collaterals, and sons of a grandfather of deceased are not remote collaterals 71

The references are to the Nos. given to the cases in the "Record."

No.

- Custom, Evidence.*—*Jats of Jaj gôt, Hoshiarpur tahsil*—*Gift to or adoption of step-son of another gôt.*—*Found*, in a suit the parties to which were Jats of the Jaj gôt in the Hoshiarpur tahsil (the alleged donee or adopted son being however of a different gôt), that no custom was proved authorising a gift of ancestral land to a step-son in the presence of near collaterals, or the adoption of such son by his step-father, the burden of proof in either case being upon those seeking to maintain the gift or adoption ... 83
- " " *Alienation*—*Unequal distribution of ancestral land between sons and sons's sons*—*Jats of tahsil and District Hoshiarpur.*—*Found*, in a suit the parties to which were Jats of Nangal Ishar, tahsil and District Hoshiarpur, that :
- (a) the onus of proving a custom empowering a father to make an unequal distribution of his ancestral holding was on the person relying on such a custom ; and
- (b) that the defendants, who relied on such a power, had failed to establish it.
- Punjab Record*, No. 164 of 1884, and Nos. 7 and 115 of 1891, referred to ... 138
- Custom, Inheritance.*—*Customary adoption of the Punjab*—*Succession of collateral heirs in his natural family of person adopted, in default of lineal descendants.*—*Held*, by the Full Bench, that there is no general custom prevalent amongst agriculturists in the Punjab by which the collateral heirs, in his natural family, of a man who has been adopted under a customary adoption, succeed in default of his lineal heirs, to the property which he acquired or inherited by virtue of his adoption.
- Not only is there no such general custom, but such a succession is quite opposed to the general principles which regulate the succession to land in the village communities of the Punjab ... 12
- " " *Widow of son who has predeceased his father*—*Muhammadan Gorewaha Rajputs, Garshankar tahsil, Hoshiarpur District.*—*Found*, that among Muhammadan Gorewaha Rajputs of the Garshankar tahsil, Hoshiarpur District, the widow of a man who predeceased his father succeeds by custom on the father's death to the estate to which her husband would have succeeded if he had survived his father,—the succession being to the usual widow's estate without power of alienation, except for valid necessity ... 23
- " " *Unmarried daughter*—*Maintenance out of or succession to deceased father's estate*—*Hindu Jats, Ludhiana District.*—*Found*, that among Hindu Jats of the Ludhiana District, custom recognises the right of the unmarried daughters to be maintained out of the estate of the deceased father, and even in some cases a right to possession of the estate until marriage ... 50
- " " *Whole and half blood*—*Pagwand or Chandawand*—*Sheikhs of mauza Saman, tahsil Attock.*—*Found*, in a suit between the whole and the half blood, the parties to which were Sheikhs of mauza Saman, tahsil Attock, Rawalpindi District, descended from a Hindu ancestor who became a convert to Islam some six or seven generations back,

The references are to the Nos. given to the cases in the "Record."

	No.
that the custom of the family being found to be <i>pagwand</i> , the burden of proof that the whole blood excluded the half blood in succession to a deceased brother lay upon the defendant, the full brother of the deceased, and had not been discharged.	
Punjab Record, No. 4 of 1891, referred to	58
Custom, <i>Inheritance</i> .— <i>Prostitutes of Lahore—Muhammadan law</i> .— <i>Found</i> , in a suit the parties to which were professed prostitutes residing at Lahore, that no special custom was proved regulating the succession to the property of a collateral, and that, therefore, Muhammadan law must be applied	62
" " <i>Daughter's son—Muhammadan Awans, Ludhiana District</i> .— <i>Found</i> , in a suit the parties to which were Muhammadan Awans of the Ludhiana District, that agnates whose common ancestor was in the tenth generation from the deceased, were entitled to succeed in preference to the daughter's son	64
" " <i>Moghuls of Kharkhodah, Rohtak District—Sister and sister's sons—Burden of proof</i> .— <i>Found</i> , in a suit the parties to which were the descendants of a common ancestor, a Moghul resident in the village or <i>kasba</i> of Kharkhodah in the Rohtak District, that it was proved that, by the custom of the village, a sister and a sister's son excluded descendants of the deceased's grandfather.	
<i>Held</i> , also, that the burden of proof lay in the first instance on the sister and sister's sons claiming in opposition to the male issue of the grandfather; but that they had made out a <i>prima facie</i> case shifting the onus to the other side.	
As a general rule, by agricultural custom, females or the issue of females do not inherit ancestral land. Occasionally, daughters and daughters' sons do inherit after their father in the absence of sons. More rarely, sisters and their issue inherit after brothers. The right to succeed of females and their issue, when it exists, generally exists only in presence of remote collaterals, and the sons of a grandfather of deceased are not remote collaterals	71
" " <i>Khanship, Peshawar District—Property specially attached to, or governed by, ordinary rules of succession</i> .— <i>Found</i> , upon the evidence, that the property in dispute was not permanently attached to a Khanship in the Peshawar District, but was subject to the same rules of succession as the other landed property of the Khan.	77
" " <i>Khanadamad—Appointment of, to succeed to estate of sonless proprietor—Arains of tahsil Zira, Ferozepore District</i> .— <i>Found</i> , in a suit the parties to which were Arains of tahsil Zira in the Ferozepore District, that according to the custom of the tribe a <i>khanadamad</i> may be appointed to succeed to the estate of a sonless proprietor to the exclusion of his brother and nephews	107
" " <i>Right of sister and sister's son—Dhariwal Jats, Fazilka tahsil, Ferozepore District</i> .— <i>Found</i> , in a suit the parties to which were Dhariwal Jats of the Fazilka tahsil of the Ferozepore District, that no custom was established by which a sister and her son were entitled to inherit acquired landed property in preference to collaterals descended from the grandfather of the deceased owner	113

The references are to the Nos. given to the cases in the "Record."

	No.
<i>Custom, Inheritance.—Right of daughter and daughter's son to exclude nephews—Jhiwars (Awans) of Rawalpindi.—Found, in a suit the parties to which were Awans by tribe and Jhiwars (water-carriers) by occupation, in the town of Rawalpindi, that no custom was proved entitling a daughter and a daughter's son to exclude a brother and nephews in succession to acquired immoveable property (a water-mill) ...</i>	115
<i>" " Kalru Jats, Mooltan District.—Exclusion of nephews by daughters of deceased.—Found, in a suit the parties to which were Kalru Jats (Muhammadans) of tahsil and District Mooltan, that no uniform custom was established by which daughters were excluded by brothers' sons from taking the share of their father's estate falling to them under Muhammadan law.</i>	
<i>Punjab Record, No. 12 of 1889, referred to and followed ...</i>	116
<i>" " Pagwand and chundawand—Randhawa Jats of tahsil Ajnala, Amritsar District.—Found, in a suit the parties to which were Hindu Randhawa Jats of the village of Chamiani in the Ajnala tahsil of the Amritsar District, that by the existing custom of such Jats in this village, the chundawand and not the pagwand rule of distribution applied to the deceased father's land.</i>	
<i>Remarks on the custom in the Amritsar District being in a state of transformation from chundawand to pagwand ...</i>	134
<i>" " Married and unmarried daughters—Resident son-in-law—Manjh Rajputs (Mussalmans) of tahsil and District Ludhiana.—Found, in a suit the parties to which were Manjh Rajputs (Mussalmans) of Raisur, tahsil and District Ludhiana—</i>	
<i>(1) That no custom was established by which a married daughter succeeded as heir to her father in the presence of collaterals, even with a life-interest; and</i>	
<i>(2) that a resident son-in-law as such was in no better position than the daughter, custom also not recognizing his right in the presence of the collaterals of his father-in-law ...</i>	139
<i>" " Pagwand and chundawand—Whole and half blood—Siddhu Barar Jats of Fatehabad tahsil in the Hissar District.—Found, in a suit the parties to which were Siddhu Barar Jats of mauza Budhladha in the Fatehabad tahsil of the Hissar District, that the relations of the whole blood excluded those of the half blood in succession to a deceased collateral.</i>	
<i>The family land having been divided on the chundawand and not on the pagwand principle, the onus was on the plaintiffs, the half blood relations, to establish that they were entitled to share with the defendants, the relations of the whole blood, in the inheritance of the deceased.</i>	
<i>Punjab Record, No. 125 of 1884 and No. 4 of 1891 (F. B.), referred to ...</i>	143
<i>Custom, Maintenance.—Unmarried daughter—Maintenance out of or succession to deceased father's estate—Hindu Jats, Ludhiana District.—Found, that among Hindu Jats of the Ludhiana District, custom recognises the right of the unmarried daughters to be maintained out of the estate of the deceased father, and even in some cases a right to possession of the estate until marriage ...</i>	50

The references are to the Nos. given to the cases in the "Record."

No.

Custom, Religious Institution.—Golden Temple, Amritsar—Succession of gaddinashin—Custom as to—Survivorship.—In determining the right of succession to the office of *gaddinashin*, the only law to be observed is to be found in the custom and practice, which must be proved by evidence.

Hitherto, the rule of succession in the case of the Darbar Sahib, or Golden Temple, at Amritsar, has been that the *gaddinashins* have nominated successors, who have been installed in each case without objection.

Held, that no good grounds existed for applying the doctrine of survivorship to a case such as this, there being no analogy between three *gaddinashins* who were to all intents and purposes separate and not joint, and the case of an undivided Hindu family among whom the doctrine of survivorship prevails.

Held, also, that it would not be just or equitable to reduce the customary number of *gaddinashins* from three to two, merely to benefit the plaintiffs and to the detriment of the institution and its supporters.

49

Succession to office of mahant—Dharmasala Thakar Bhawal Singh, Amritsar—Nomination of successor—Approval of brotherhood.—In a suit regarding the succession to the office of mahant of the Dharmasala of Nirmala Sadhs, known as Thakar Bhawal Singh, situate outside the city of Amritsar, *held*, that by custom the rule of succession was that the mahant may nominate his successor, but that the nomination will not prevail unless the brotherhood formally approve the appointment.

If there be no nomination, then the brotherhood meet and formally appoint.

If the mahant misconducts himself, the brotherhood have the power to dismiss him.

The brotherhood, strictly speaking, are those connected by spiritual ties with the founder of the institution, although it apparently may be held to include also the whole sect who are also related to each other by spiritual ties.

Punjab Record, No. 37 of 1891, referred to ...

105

Muhammadan shrine, Dera Ismail Khan District—Succession to land and offerings—Alienation—Religious office.—J. M., who died about a year before suit, was owner of half the land attached to the Shah Habibwala khangah in the Dera Ismail Khan District and was entitled to a half share in the management and offerings of the shrine: he settled this property on N. M., his sister's son on condition that he (the grantor) should receive maintenance during his lifetime.

The plaintiffs, members of the family and related to J. M., in the fourth degree (computed in accordance with the opinion expressed in *Punjab Record*, No. 126 of 1890) were entitled to a two-thirds share of the other moiety of the management and offerings, and sued to set aside the above arrangement on the grounds (1) that the property was *wakf*, and (2) that J. M. was not competent to make the alienation.

The references are to the Nos. given to the cases in the "Record."

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Held, that by custom the plaintiffs were entitled to inherit the share in the management and offerings in preference to N. M., a sister's son, his place being after collaterals related in the fourth degree.

Held, also, that assuming that J. M., as proprietor could alienate only for necessity, there appeared to be satisfactory reasons for holding that the alienation of the land was justified by necessity. The land was simply heritable property unconnected with the shrine, save that hitherto both had belonged to the same people.

Held, also, that the shrine must be regarded as a religious institution of a sort. It could not be regarded as *wakf*, it being nowhere laid down that a mausoleum raised to a saint is to be so treated. The succession to the superintendence and management of the shrine are to be determined by the rule and custom which have hitherto been applied to the particular institution, as in other like cases.

Held, further, that the transfer of a share in the shrine and the offerings was akin to the transfer of a religious office and was invalid. I. L. R., 6 Mad., 76, referred to and followed ... 106

Custom—Village Menials.—Sale of their houses by, without consent of proprietors.—Found, that in the village of Haria in the Bhera tahsil, Shahpur District, no custom was established permitting menials to sell their houses without the consent of the proprietary body ... 99

D.

Damages—Mortgage—Absence of covenant to pay interest after due date—Allowance of, by way of damages—Charge.—A deed of mortgage contained no covenant for payment of interest post diem.

Held, that interest could notwithstanding be allowed by way of damages—in so far as such damages were within limitation (six years)—and be declared a charge upon the mortgaged property ... 73

*Declaratory Decree.—Specific Relief Act, 1877, Section 42—Plaintiff alleging title as well as possession, asking for declaration as to possession only—Judicial discretion.—The plaintiffs sued, alleging that they were owners and in possession of certain land; that two deeds of sale were executed by them in 1877 and 1879, purporting to convey portions of the said land to the defendant; that the defendant never got possession under the said deeds, as the full consideration money was never paid by him; that notwithstanding this fact, the defendant had succeeded in obtaining *dakhil kharij* from the Revenue authorities, which was calculated to cause injury to the plaintiffs, though it had not ousted them from actual possession; and the plaintiffs therefore prayed for a declaratory decree that they were in possession of the entire land, and that the mutation in the defendant's favour would not affect their rights of possession. The plaintiff was silent on the question as to with whom the ownership of the property legally rested.*

Held, that the suit as laid had been rightly dismissed. Assuming it to be correct, that a plaintiff who alleges title as well as possession cannot be allowed to ask for a declaration as to his possession only, there being a further dispute between the parties as to the title, the suit would not lie.

The references are to the Nos. given to the cases in the "Record."

No.

But in any case, the proper decree for a Court to make upon a claim framed in the above manner, and leaving open the question of title, would be one declining to exercise its judicial discretion by making any such declaration, the effect of which would be to leave the real matter of dispute between the parties undecided and undisposed of

48

Demolition of Buildings.—See Buildings.

Dharmshala.—See Religious Institution.

Dhari, or sub-division of Patti.—See Pre-emption.

Dower.—*Indian Limitation Act, 1877, Schedule II, Article 103*—*Dower—Demand and refusal, nature of.*—The demand and refusal to pay dower must be made in clear and unambiguous language, otherwise Article 103, Schedule II of the Limitation Act, 1877, will not come into operation (cf. 15 B. L. R., 306)

63

E.

Ejectment.—*Right to sue—Habitual worshipper at mosque—Ejectment of trespasser.*—In a suit by one who was a habitual worshipper at a certain Muhammadan mosque, of which he was also a neighbour and a supporter or well-wisher, for the ejectment of the defendant from certain land alleged to be attached to the mosque and to have been unlawfully encroached upon, the Divisional Judge dismissed the plaintiff's suit holding that he was not competent to maintain it.

Held, that the suit would lie. Every Muhammadan who has a right to use a mosque is competent to maintain a suit against any one who interferes with the exercise of his such right to use: and by the same analogy every Muhammadan has a right to maintain a suit against persons who commit an injury upon property which has been devoted to the support of a mosque

87

Equity and good conscience.—*Custody of wife—Husband undergoing sentence of transportation for life at Port Blair.*—The lower Appellate Court gave the plaintiff, a Jat of the Jullundur District, who was undergoing a sentence of transportation for life at the penal settlement of Port Blair in the Andaman Islands, a decree for the custody of his wife.

Held, that the decree should not have been made and must be reversed, it not being in accordance with the principles of equity and good conscience that a young woman, who had hardly attained maturity when her husband was transported for life, should be directed to proceed to a penal settlement and cohabit with him there

47

Evidence.—*Custom—Wajib-ul-arz—Modification of custom.*—The parts of a *Wajib-ul-arz* referring to custom are not provisions intended to be in force for a limited period only,—they are statements that a certain custom exists. The statement may or may not be correct, but if it is correct, there would be a natural presumption that the custom continued to exist, and it would be for those alleging that a change had subsequently taken place to prove the allegation.

The production of a later Record of Rights containing entries opposed to the earlier one would no doubt be some proof of such a change, but there would then merely be a balance of evidence on either side; it could not be said that the second Record destroyed or abrogated the earlier one.

Punjab Record, No. 107 of 1887, referred to

8

The references are to the Nos. given to the cases in the "Record."

No.

Evidence.—Custom—Burden of proof.—Found, in a suit the parties to which were Gujars of the Hoshiarpur tahsil, that no custom was established justifying an alienation by a childless proprietor to two nephews in the presence of other nephews,—the onus being upon the alienees to establish the custom.

Per RIVAZ, J.—In cases raising important issues of custom, it is desirable that Courts of first instance should, before deciding as to the burden of proof, call for evidence from both sides, and defer adjusting the question of onus until all possible information has been obtained from either party 35

" **Presumption of death—Rule of Muhammadan law superseded by Evidence Act.**—The rule of Muhammadan law which refuses to presume a person dead until ninety years from the date of his birth, is a rule of evidence, and not of substantive law, and is superseded in all cases in which the question of the presumption whether a man is alive or dead arises under Section 108, Indian Evidence Act (cf. also Section 2 of the Act) 42

" **Custom—Awans of Rawalpindi—Childless proprietor—Gift to grand-nephew in presence of brother—Burden of proof.—Found**, that among Muhammadan Awans of the Rawalpindi District a childless proprietor is not competent, in presence of a brother, to convey his whole estate by gift to his grand-nephews.

Semle.—In adjusting the burden of proof in such an alienation, the same rule applies as if the case had occurred in a part of the Province in which the Full Bench ruling, *Punjab Record*, No. 107 of 1887, is to be regarded 52

" **Custom—Sale without necessity to collateral—Burden of proof.**—A childless proprietor sold his land to the plaintiff, a collateral relation who lived with him, and then died. The plaintiff sued the other collaterals, who, like himself, would be entitled to inherit along with him but for the sale, to recover possession of the land.

Held, that the alienation without necessity was bad by custom and that the burden of proof was upon the plaintiff to support the sale ... 53

" **Whole and half blood—Pagwand or chundawand—Sheikhs of mauza Saman, tahsil Attock—Burden of proof.**—**Found**, in a suit between the whole and the half blood, the parties to which were Sheikhs of mauza Saman, tahsil Attock, Rawalpindi District, descended from a Hindu ancestor, who became a convert to Islam some six or seven generations back, that the custom of the family being found to be *pagwand*, the burden of proof that the whole blood excluded the half blood in succession to a deceased brother lay upon the defendant, the full brother of the deceased, and had not been discharged.

Punjab Record, No. 4 of 1891, referred to 58

" **Custom—Alienation—Childless proprietor—Goraya Jats, tahsil Ajnala, Amritsar District.**—**Found**, in a suit the parties to which were Goraya Jats of tahsil Ajnala, Amritsar District, that a mortgage—which was held to be in fact a purely colourable transaction—by a childless proprietor in favour of a nephew in the presence of other near collaterals was not authorized by custom.

The references are to the Nos. given to the cases in the "Record."

	No.
The onus of establishing the validity of the alienation was upon those setting it up, within the general principles explained in <i>Punjab Record</i> , No. 107 of 1887	61
<i>Evidence.—Custom—Succession—Moghuls of Kharkhodah, Rohtak District—Sister and sister's sons—Burden of proof.—Found</i> , in a suit the parties to which were the descendants of a common ancestor, a Moghul, resident in the village or kasba of Kharkhodah in the Rohtak District, that it was proved that, by the custom of the village, a sister and a sister's son excluded descendants of the deceased's grandfather.	
<i>Held</i> , also, that the burden of proof lay in the first instance on the sister and sister's sons claiming in opposition to the male issue of the grandfather; but that they had made out a <i>prima facie</i> case shifting the onus to the other side.	
As a general rule, by agricultural custom, females or the issue of females do not inherit ancestral land. Occasionally, daughters and daughter's sons do inherit after their father in the absence of sons. More rarely, sisters and their issue inherit after brothers. The right to succeed of females and their issue, when it exists, generally exists only in presence of remote collaterals, and the sons of a grandfather of deceased are not remote collaterals	71
" <i>Hindu Law—Hindu widow—Raising money by mortgage of husband's immoveable property—Burden of proof.—P. M. sued to contest a mortgage of house property effected by his brother's widow, the said house forming part of the deceased husband's estate of which the widow was in possession.</i>	
<i>Held</i> , that it was sufficient to defeat an alienation of this nature that, upon the whole case, there was no proof of the mortgagees having fulfilled the legal obligation to inquire and satisfy themselves that the widow from whom they were taking a mortgage upon her husband's inheritance, had a proper justification for so mortgaging it.	
I. L. R., 14 All., 420 (P. C.), referred to and followed...	137
<i>Estoppel.—Par delictum—Party estopped from pleading his own fraud.—The plaintiff sued for possession of half a house which he alleged was the joint property of himself and the defendant; the latter relied upon a registered deed of sale to him from the plaintiff, purporting to sell his (plaintiff's) interest in the house. The plaintiff replied that this was a fictitious transaction entered into in fraud of his creditors.</i>	
<i>Held</i> , that the plaintiff was precluded by the rule of <i>par delictum</i> from relying on such an allegation	38
<i>Execution of decree.—Civil Procedure Code, Section 230 (b)—Annual or monthly payments—Decree directing payment at a certain date.—Decrees for annual or monthly payments fall within and are governed by the provisions of Section 230 (b), Civil Procedure Code, 1882</i>	13
" <i>Sale in execution of decrees—Absence of certificate of sale—Suit by purchaser—Title against party to the suit or his representative in interest.—The plaintiff sued, alleging that he was the purchaser of a house at an execution sale following decree against B., defendant 2, on account of a debt due from B.'s deceased husband. The defendant 1 was B.'s second husband, and defendant 3 her son. The plaintiff could produce no certificate of sale.</i>	

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the non-production of a certificate was not fatal to the plaintiff's claim.

When the plaintiff is suing to eject not a third party, but the very person who was a party to the suit which led to the execution sale, or persons whose interests are identical with such party, the mere omission to produce a certificate of sale is not fatal to the success of the suit. A party to the suit, or his representative in interest, cannot, after the sale has been confirmed, dispute the purchaser's title, as the order confirming the sale completes the title as against the parties to the suit.

- I. L. R., 12 Bom., 589, followed 27
- Execution of decree.—Joint Hindu family—Mitakshara—Liability of ancestral property in execution of decree against father alone.*—The authorities governing the question as to how far in a joint Hindu family governed by the law of the Mitakshara, consisting of a father and sons, the ancestral property is liable in execution of decrees obtained against the father alone, collected and discussed 33
- " " *Execution of decree—Leave to withdraw—Effect of Sections 373 and 647, Civil Procedure Code.*—The decision of the High Court of Allahabad (I. L. R., 12 All., 392) that Section 647 of the Civil Procedure Code makes Section 373 applicable to proceedings in execution of decree, dissented from 37
- " " *Interest on decree—Principle of calculation.—Semble.*—The correct method of calculating interest on a decree is to take each payment made: calculate the amount of interest due on the decree up to the date of this payment: credit the payment of this interest: and carry the surplus of the payment to the credit of the principal, and strike a fresh balance 55
- " " *Civil Procedure Code, 1882, Section 295—Priority—Rateable distribution among rival decree-holders.*—Property which a Court has accepted as security for a decree is not liable to attachment by, and to be divided rateably among, rival decree holders. To hold otherwise would be to render the provisions of the law for stay of execution on giving security illusory; and it is immaterial whether the property in question is offered as security by the judgment-debtor himself, or by a third party. If the property is liable to attachment and distribution under Section 295, Civil Procedure Code, in satisfaction of decrees against the judgment-debtor, it would be similarly liable when there were decrees against the surety as a third party.
- It is the property, not the person offering it, which the Court accepts as security, and the acceptance thereof by the Court creates a charge on the property, by whomsoever offered, which must take precedence of all subsequent attachments or charges 60
- " " *Suit to recover amount paid out of Court in execution of decree—Indian Limitation Act, 1877, Schedule II, Articles 97 and 115.*—The defendant, K. L., obtained a decree against plaintiff for Rs. 2,347, and employed the other defendant, K. R., to execute the decree as his agent under a formal power of attorney.

The plaintiff in the present suit alleged a payment of Rs. 900 in cash to the agent on 3rd February 1885.

The references are to the Nos. given to the cases in the "Record."

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On 2nd November 1887, execution of the decree was sued out without credit being given for the Rs. 900, and on 28th February 1888 K. L. denied the receipt of the money through his agent and declined to give credit for the amount.

On 22nd April 1889, the plaintiff (in the present suit) sued to recover the Rs. 900 alleged to have been paid.

Held, that the suit would lie and was governed either by Article 97 or 115, Schedule II of the Indian Limitation Act, 1867, and was within time

79

Execution of decree.—Civil Procedure Code, Section 549—Security for costs—Recovery of costs from surety in execution or by separate suit—Liability of surety if decree against principal debtor is barred by limitation.—A. J. was plaintiff-appellant in an appeal pending in the High Court at Allahabad and was required under Section 549, Civil Procedure Code, to give security for the costs of the appeal. Pursuant to that order, A. J. tendered a security bond, dated 8th September 1881, by which A. S. (defendant in the present suit) agreed to be responsible to the extent of Rs. 1,400, hypothecating a haveli situate at Sujampur in the Gurdaspur District to secure the said sum.

On 5th April 1882, A. J.'s appeal to the High Court was dismissed with costs; and on 23rd June 1890, the defendant-respondent in that appeal filed a suit against A. S. for recovery of Rs. 1,400 on the instrument of 8th September 1881, execution of the High Court decree for costs against A. J., the principal debtor, having meanwhile become barred by limitation.

Held, following *Punjab Record*, No. 109 of 1886, that at the date of the High Court decree the plaintiff had no remedy against the defendant (the surety) except by regular suit, and such remedy was not impaired by the fact, that in 1888 the Legislature altered the law by providing a remedy by way of execution, which, but for the law of limitation, would have been available to the plaintiff after Act VII of 1888 became law, the rule that pending proceedings are generally governed by any change in the law of procedure not being extendible to substantive rights.

Held, also, that A. S. was not discharged from liability by reason that the right of the plaintiff in the present suit to execute the decree for costs against A. J. was barred by limitation

136

Extinguishment of proprietary rights.—Abandonment of land—Extinguishment of proprietary rights.—Held, by the Full Bench, that an owner of land who has abandoned it within twelve years previously to the institution by him of a suit for possession thereof, does not by such mere act of abandonment lose his proprietary rights. His title will prevail provided that it has not been extinguished by the operation of the law of limitation

85

F.

Foreign Judgment.—Civil Procedure Code, 1882—Suit on foreign judgment—Enquiry into the merits of case in which the judgment was passed.—According to the Code of Civil Procedure, 1882, Section 14, as amended by Act VII of 1888, when a suit is instituted in British India on the judgment of a Court of a Native State in India, the Court in which the suit is instituted is not precluded from inquiry into the merits of the claim

102

The references are to the Nos. given to the cases in the "Record."

Na

Fraud.—*Par delictum*—Party estopped from pleading his own fraud.—The plaintiff sued for possession of half a house which he alleged was the joint property of himself and the defendant; the latter relied upon a registered deed of sale to him from the plaintiff, purporting to sell his (plaintiff's) interest in the house. The plaintiff replied that this was a fictitious transaction entered into in fraud of his creditors.

Held, that the plaintiff was precluded by the rule of *par delictum* from relying on such an allegation 38

G.

Gift.—*See* Custom, Alienation.

Golden Temple, Amritsar.—*See* Religious Institution.

Guardian and ward.—*Lease of ward's property to guardian*—*Introduction of outsider into management of ancestral holding.*—The District Judge appointed L. S., a connection by marriage, guardian of the property and person of a minor, on the ground, apparently, that he was willing to take the minor's land on a lease of Re. 1-3-0 per ghumao instead of Re. 1-0-0 offered by K. S., the minor's grand-uncle.

Held, that the appointment must be cancelled. Not only is a lease to a guardian of his ward's land most objectionable, but also the effect of the District Judge's order would be to transfer the control of a large share in an ancestral holding from the family of the co-sharers to the family of another tribe, i. e., to the husband of the father's sister. Such an order would only be justified if it were clearly proved that the members of the minor's own family were unfit to be his guardian

78

H.

Hindu Law.—*Joint undivided family*—*Survivorship*—*Principles governing question whether a partition has taken place.*—Plaintiff sued to recover the amount of principal and interest alleged to be due on a bond executed by K. S., deceased, who died in 1884, leaving a widow and two brothers, all three being made defendants in the suit.

The first Court decreed the claim against the two brothers only to the extent of the principal sum named in the bond, together with simple interest.

The two brothers appealed to the Chief Court, contending that they and the deceased formed a joint Hindu family, and that they consequently took the whole of the joint property by survivorship and were therefore not liable for the present debt of the deceased.

Held, after enquiry upon remand, that the previous litigation which had taken place between the parties effected such a separation of interests as to have destroyed the jointness of the estate according to the principle enunciated by the Privy Council in *Appover's case* and other subsequent decisions.

The principles and authorities governing the question whether a partition can in any case be held to have taken place, in fact or in law, stated and discussed 2

„ „ **Udasi faqir**—*Abandonment of worldly affairs*—*Loss of rights of inheritance.*—By Hindu law, if a man becomes an Udasi faqir, he abandons worldly affairs and loses his civil rights of inheritance in

The references are to the Nos. given to the cases in the "Record."

No.

his natural family. But it is yet possible that a man may resolve to become a faqir of the Udasi sect and yet resolve not to abandon worldly affairs and his civil rights of inheritance, the effect that such a course might have upon his status as a faqir, in the eyes of other Udasi faqirs, not being material.

The true issue in such cases is, did the man on becoming a faqir also intend to renounce and did he renounce the world, the burden of proof that he did not, being upon him ... 7

Hindu Law—Joint Hindu family—Mitakshara—Liability of ancestral property in execution of decree against father alone.—The authorities governing the question as to how far in a joint Hindu family governed by the law of the Mitakshara, consisting of a father and sons, the ancestral property is liable in execution of decrees obtained against the father alone, collected and discussed ... 33

" " *Hindu widow—Raising money by mortgage of husband's immoveable property—Burden of proof.*—P. M. sued to contest a mortgage of house property effected by his brother's widow, the said house forming part of the deceased husband's estate of which the widow was in possession.

Held, that it was sufficient to defeat an alienation of this nature that, upon the whole case, there was no proof of the mortgagees having fulfilled the legal obligation to inquire and satisfy themselves that the widow, from whom they were taking a mortgage upon her husband's inheritance, had a proper justification for so mortgaging it. I. L. R., 14 All., 420 (P. C.) referred to and followed ... 137

" " *Joint family—Partial disruption—Presumption—Management of religious institution—Founder's rights.*—The presumption in favour of a Hindu joint family remaining joint is no longer applicable when it is admitted that a disruption of the family has once taken place. *Punjab Record*, No. 143 of 1882, referred to and followed.

There is no authority for the proposition that the management of a Hindu religious or charitable institution is on the footing of a joint tenancy and that the succession goes to the survivor ... 140

I.

Illegitimacy—Custom—Alienation—Childless proprietor—Sindhu Jats, mauza Sindhwan, Jullundur District—Illegitimacy.—Found, in a suit, the parties to which were Sindhu Jats of the village of Sindhwan, tahsil Nawashahr, Jullundur District, that no custom was proved conferring on a childless proprietor an unrestricted power of alienation of ancestral land in the presence of nephews.

The sons of the deceased, their mother being the wife of another man, must be deemed to be illegitimate.

Punjab Record, No. 84 of 1889, and No. 49 of 1890, referred to ... 72

Interest.—Mortgage deed—Interest—Rights of mortgage—Charge upon mortgaged property.—Where there is a clear agreement that a mortgagor will pay interest year by year and that he will not be entitled to redeem without paying the whole amount of the principal and interest due by him, such principal and interest form a charge upon the mortgaged property to which effect must be given.

The references are to the Nos. given to the cases in the "Record."

No.

Punjab Record, No. 57 of 1888 and No. 8 of 1890, referred to and explained.

I. L. R., 19 Calc., 19 referred to ... 28

Interest.—*Interest on decree—Principle of calculation.—Semble.*—The correct method of calculating interest on a decree is to take each payment made: calculate the amount of interest due on the decree up to the date of this payment: credit the payment of this interest: and carry the surplus of the payment to the credit of the principle and strike a fresh balance ... 55

" *Mortgage—Absence of covenant to pay interest after due date—Allowance of, by way of damages—Charge.*—A deed of mortgage contained no covenant for payment of interest *post diem*.

Held, that interest could notwithstanding be allowed by way of damages—in so far as such damages were within limitation (six years)—and be declared a charge upon the mortgaged property ... 73

J.

Jurisdiction.—*Right to use of water—Land-suit—Punjab Courts Act, 1884, Section 3—Appeal.*—The plaintiff sued to establish his right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4 of the Punjab Tenancy Act, 1887: no claim was made to any share in the land occupied by the canal, or in the canal as a whole.

Held, (Roe J., doubting) that the suit was not a "land suit" as defined in Section 3, Punjab Courts Act, 1884 (as amended) ... 1

" *Further appeal—Land-suit—Claim for share in an orchard, i. e., of the fruit trees*—A suit for possession of a half share in an orchard, that is, in the fruit trees, is not a "land-suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884.

Punjab Record, No. 119 of 1890 referred to ... 15

" *Civil and Revenue Courts—Suit for land and mesne profits.*—The Court of first instance (a Civil Court) entertained and disposed of a suit in which the possession of land was claimed and also *mesne profits*. The Court decreed in the plaintiff's favour both for the land and the *mesne profits*.

Held, that the claim as laid was partly cognizable by the Civil and partly by the Revenue Court.

The first Court should have amended the plaint by striking out the claim for *mesne profits*, referring the plaintiff to the Revenue Courts in respect to this portion of their claim, and deciding the suit as one for land only.

The Appellate Court's duty was to remedy the error by, in any case, striking out of the decree the portion thereof awarding *mesne profits* on the ground that the first Court had no jurisdiction over the matter, and to hear and decide the appeal so far as it related to the land.

" Observations as to the making of references to the Chief Court under Section 617, Civil Procedure Code, in cases in which a further appeal will lie upon a Certificate granted by the Divisional Judge, or in which an application for revision can be preferred under Section 622 of the Code ... 19

The references are to the Nos. given to the cases in the "Record."

No.

Jurisdiction.—*"Land-suit"*—*Village graveyard*—*Further appeal.*—The plaintiffs sued, alleging that 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that the defendants had brought 6 kanals of it under cultivation two years previously, and made thorn enclosures and taken possession of certain portions.

Held, that the suit was not a land-suit, and that the suit being valued at Rs. 150, a further appeal to the Chief Court was not competent without a Certificate from the Divisional Judge under Section 40, sub-section 7 (d), Punjab Courts Act 20

" *Civil and Revenue Courts*—*Site of water-mill*—*Purpose subservient to agriculture*—*Jurisdiction.*—The plaintiff sued for damages for the unlawful possession of a water-mill.

Held, that the suit was cognizable by the Civil and not by the Revenue Courts, the purpose for which the site of the mill was occupied, viz., the grinding of corn, not being a purpose "subservient to agriculture" within the meaning of Section 4 (1), Punjab Tenancy Act, 1887 41

" *Suit by mortgagee for possession*—*Suits Valuation Act, 1887.*—*Value for purposes of jurisdiction.*—A suit by a mortgagee seeking to recover possession of land under his mortgage is a suit falling within the rules made under the Suits Valuation Act, 1887, which provide that in suits for possession of land under clause 5, Section 7, Court Fees Act, 1870, the value of the suit for purposes of jurisdiction is thirty times the land-revenue.

The ruling in *Punjab Record*, No. 1 of 1887, that in a suit by a mortgagee for possession, the subject matter was not the land itself but the mortgagee's interest therein under the mortgage, must be deemed to be superseded by the passing of the Suits Valuation Act and the rules made thereunder 56

" *Jurisdiction of Court of Political Agent, Bhopal*—*Jurisdiction of British Court to make decree affecting immoveable property out of British India.*—In a suit for partition and possession of a one-third share of property, moveable and immoveable, including cash and choses in action, the Court of first instance (District Judge, Delhi) being of opinion that issues could not be properly settled until defendants 1, 2 and 3 produced their books, which the Political Agent of Bhopal reported could not be spared, directed defendant 1 to file a written statement setting forth in detail the entire joint property, moveable and immoveable, and in the case of trading firms, a balance sheet for each showing how they stood on the date of suit.

Held, that the Court of the Political Agent, Bhopal, whatever its jurisdiction may be, was not one of the nature referred to in Section 12, Civil Procedure Code, not being established by the authority of the Governor-General in Council, and Bhopal not forming part of British India.

Quære.—Whether the District Judge, Delhi, had jurisdiction with regard to the immoveable property situate and businesses conducted in foreign territory 59

The references are to the Nos. given to the cases in the "Record."

No.

Jurisdiction.—*Civil Procedure Code, 1882, Section 295—Priority—Rateable distribution among rival decree-holders.*—Property which a Court has accepted as security for a decree is not liable to attachment by, and to be divided rateably among, rival decree-holders. To hold otherwise would be to render the provisions of the law for stay of execution on giving security illusory; and it is immaterial whether the property in question is offered as security by the judgment-debtor himself or by a third party. If the property is liable to attachment and distribution under Section 295, Civil Procedure Code, in satisfaction of decrees against the judgment-debtor, it would be similarly liable when there were decrees against the surety as a third party.

It is the property, not the person offering it, which the Court accepts as security, and the acceptance thereof by the Court creates a charge on the property, by whomsoever offered, which must take precedence of all subsequent attachments or charges 60

" **Jurisdiction of Civil Court—Mortgage by occupancy tenant—Mortgagee to receive half net profits without possession—Punjab Tenancy Act, 1887, Section 77 (k).**—The defendant, a tenant with rights of occupancy, mortgaged his land to the plaintiff on the understanding that the mortgagor should retain possession and the mortgagee receive half the net profits of the tenancy.

The defendant withheld from the plaintiff his share of the profits; hence the present suit.

Held, that the suit was cognizable by the Civil Court, the plaintiff and defendant not being co-sharers "in an estate or holding," and clause (k), sub-section (3), Section 77, Punjab Tenancy Act, 1887, being therefore inapplicable 70

" **Small cause—Suit for share of offerings received for a specified period.**—A suit for a certain share of offerings received at a shrine for a certain period, the plaintiffs claiming as rightful successors to the former incumbent, the defendants being one, the Manager of the Golden Temple, who held the money in dispute in safe custody only, and the other defendant a rival claimant who set up a title as donee, is a "small cause" 84

" **Suit for account—Value of relief sought—Jurisdiction—Course of appeal—Authority of Appellate Court disclaiming jurisdiction to order payment of additional Court Fee.**—The plaintiff sued the defendant for an account valuing the relief sought at Rs. 100, and expressing his willingness to pay the Court fee due upon any sum decreed in excess of this amount, in accordance with the provisions of Section 11, Court Fees Act, 1870.

After the defendant had produced the books containing the parties' accounts and a commission had examined the same, the plaintiff filed a petition stating that he appeared to be *prima facie* entitled to recover a sum over Rs. 12,000 and praying that the matter might be fully investigated. No amendment of the plaint was, however, either asked for or ordered, and the suit eventually resulted in a decree in the plaintiff's favour for Rs. 2,343.

The plaintiff then appeared for a further sum of Rs. 1,716; and the defendant, against the decree in the plaintiff's favour, for Rs. 2,343.

The references are to the Nos. given to the cases in the "Record."

No.

Both parties presented their appeals to the Divisional Judge, who held that the appeals lay to the Chief Court.

Held, that the appeals lay to the Divisional Judge: under Section 7, clause (iv) of the Court Fees Act, the valuation of the original suit for purposes of Court fee is fixed at the amount at which the relief sought is valued in the plaint. This, in the present case, was Rs. 100 and the amount was never altered by any amendment of the plaint and under Section 8, Suits Valuation Act, 1887, the value of a suit for an account as determinable for the computation of Court fees and the value for purposes of jurisdiction, shall be the same.

The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisional Court under Section 39, Punjab Courts Act (as amended).

Semle.—If an Appellate Court has no jurisdiction to hear an appeal, it is not competent to it to pass orders for the payment of any additional Court fee which it considers should have been levied in the first Court.

[Cf. *Punjab Record*, No. 40 of 1892] 86

Jurisdiction.—*Jurisdiction of Civil Court*—Section 158 (2) (xvii) *Land Revenue Act*, 1887—*Allegation of error in partition proceedings*.—The plaintiffs sued for a declaration that they were owners of certain land contained in three specified *khasra* numbers of which they alleged that they were in possession under a partition made by the Revenue authorities in 1884.

The final record of the partition showed that the land fell to the defendant's share, but this it was alleged was owing to an error in the preparation of the final papers.

Held, that the suit distinctly raised a question connected with, or arising out of, proceedings for partition within the meaning of Section 158, sub-section (2) (xvii), Punjab Land Revenue Act, 1887, and that the question was not one "as to title in any of the property of which partition is sought" within the same clause, and that the jurisdiction of the Civil Courts was ousted 88

Jurisdiction.—*Small Cause Court*—*Withdrawal of suit pending in, and determined by District Judge*—*Objection as to jurisdiction*.—In a suit heard and determined by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial proceedings, which, if objected to at the time, would have led to the dismissal of the suit.

K.

Ledgard v. Bull, I. L. R., 9 All., 191, (P. C.), referred to and followed 118

Khanship, Peshawar District.—*Property specially attached to, or governed by, ordinary rules of succession*.—*Found*, upon the evidence, that the property in dispute was not permanently attached to a Khanship in the Peshawar District, but was subject to the same rules of succession as the other landed property of the Khan 77

The references are to the Nos. given to the cases in the "Record."

No.

L.

- Land Acquisition Act, 1870.—Section 29—Agreement of Judge and assessors as to compensation—Finality of decision.**—In case the Judge and one or both of the assessors agree as to the amount of compensation in a reference made to the Court under the provisions of Part III of the Land Acquisition Act, 1870, their decision thereon shall be final, and no appeal lies, even if they differ upon minor points not falling within the scope of their jurisdiction ... 36
- Land Revenue Act, 1887.—Civil Court—Suit for declaration that land was not subject to partition—Jurisdiction.**—The plaintiff sued asking for (1) a declaration that a holding of 52 ghumaos 6 kanals and 19 marlas was not subject to partition; (2) any other relief that the Court might grant.
- The lower Courts declined to entertain the suit on the ground that it called in question the order of a Revenue Officer, and that no question of title had been referred to a Civil Court.
- Held,** that in the absence of an adjudication by the Revenue Officer himself under Section 117, Punjab Land Revenue Act, 1887, the suit was cognizable by the Civil Courts ... 39
- " **Jurisdiction of Civil Court—Section 158 (2) (xvii) Land Revenue Act, 1887—Allegation of error in partition proceedings.**—The plaintiffs sued for a declaration that they were owners of certain land contained in three specified *khassas* numbers of which they alleged that they were in possession under a partition made by the Revenue authorities in 1884.
- The final record of the partition showed that the land fell to the defendant's share, but this it was alleged was owing to an error in the preparation of the final papers.
- Held,** that the suit distinctly raised a question connected with, or arising out of, proceedings for partition within the meaning of Section 158, sub-section (2) (xvii), Punjab Land Revenue Act, 1887, and that the question was not one "as to title in any of the property of which partition is sought," within the same clause, and that the jurisdiction of the Civil Courts was ousted ... 88
- Land Suit.—Right to use of water—Land suit—Punjab Courts Act, 1884, Section 3—Appeal.**—The plaintiff sued to establish his right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4 of the Punjab Tenancy Act, 1887: no claim was made to any share in the land occupied by the canal or in the canal as a whole.
- Held** (Roe, J., doubting) that the suit was not a "land suit" as defined in Section 3, Punjab Courts Act, 1884 (as amended) ... 1
- " **Jurisdiction—Further appeal—Land suit—Claim for share in an orchard, i.e., of the fruit trees.**—A suit for possession of a half share in an orchard, that is, in the fruit trees, is not a "land suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884.
- Punjab Record, No. 119 of 1890, referred to** ... 15
- " **Jurisdiction—Civil and Revenue Courts—Suit for land and mesne profits.**—The Court of first instance (a Civil Court) entertained and disposed of a suit in which the possession of land was claimed and also mesne profits. The Court decreed in the plaintiff's favour both for the land and the mesne profits.

The references are to the Nos. given to the cases in the "Record."

	No.
<i>Held</i> , that the claim as laid was partly cognizable by the Civil and partly by the Revenue Court.	
The first Court should have amended the plaint by striking out the claim for <i>mesne</i> profits, referring the plaintiff to the Revenue Courts in respect to this portion of their claim and deciding the suit as one for land only.	
The Appellate Court's duty was to remedy the error by, in any case, striking out of the decree the portion thereof awarding <i>mesne</i> profits, on the ground that the first Court had no jurisdiction over the matter, and to hear and decide the appeal so far as it related to the land.	
Observations as to the making of references to the Chief Court under Section 617, Civil Procedure Code, in cases in which a further appeal will lie upon a Certificate granted by the Divisional Judge, or in which an application for revision can be preferred under Section 622 of the Code	19
<i>Land Suit</i> .—"Land suit"— <i>Village graveyard</i> — <i>Further appeal</i> .—The plaintiffs sued, alleging that 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that the defendants had brought 6 kanals of it under cultivation two years previously, and made thorn enclosures and taken possession of certain portions.	
<i>Held</i> , that the suit was not a land suit, and that the suit being valued at Rs. 150, a further appeal to the Chief Court was not competent without a Certificate from the Divisional Judge under Section 40, sub-section 7 (d), Punjab Courts Act	20
" <i>Civil Court</i> — <i>Suit for declaration that land was not subject to partition</i> — <i>Jurisdiction</i> .—The plaintiff sued asking for (1) a declaration that a holding of 52 ghumaos 6 kanals and 19 marlas was not subject to partition; (2) any other relief that the Court might grant.	
The lower Courts declined to entertain the suit on the ground that it called in question the order of a Revenue Officer, and that no question of title had been referred to a Civil Court.	
<i>Held</i> , that in the absence of an adjudication by the Revenue Officer himself under Section 117, Punjab Land Revenue Act, 1887, the suit was cognizable by the Civil Courts	39
<i>Leave to withdraw</i> .— <i>See</i> Execution of decree.	
<i>Limitation Act</i> , 1877.— <i>Schedule II, Articles 66, 67, 68, and 80</i> — <i>Single bond</i> .—The intention of the Limitation Act is to contrast a "single" or unconditional bond (Articles 66, 67) with a bond "subject to a condition," (Article 68).	
A "single" bond means a simple bond without alternative conditions, or penalty attached,—an absolute engagement in writing for the payment of money. (<i>Punjab Record</i> , No. 138 of 1890, followed)	26
" " <i>Schedule II, Articles 10 and 120</i> — <i>Mortgage by conditional sale</i> — <i>Foreclosure proceedings and suit for possession</i> — <i>Pre-emption</i> .—The limitation applicable to a suit for pre-emption of an undivided share in a joint holding which does not admit of physical possession being taken, and in which the purchaser acquires his title by foreclosure proceedings under Regulation XVII of 1806 and a subsequent suit for possession, is six years under Article 120, Schedule II of the Limitation Act, 1887, Article 10, having no application to such a state of facts	30

The references are to the Nos. given to the cases in the "Record."

No.

Limitation Act, 1877, Schedule II, Article 141—Suit by Hindu or Muhammadan entitled to the possession of immoveable property on death of a female.—
A. K. on 14th April 1877, executed and registered a deed of gift of his immoveable property to his sister's son, possession being given.

A. K. died in 1882.

A. K. left a widow him surviving, who died in 1888 without having, apparently, ever obtained possession of her husband's property.

In May 1890, the collaterals of A. K. sued for possession of his immoveable property.

Held, by the Full Bench, that the suit was within limitation, being governed by Article 141, Schedule II, Limitation Act, 1877.

Whatever may be the exact scope of this Article, it is clearly applicable to the case of a plaintiff claiming a childless owner's estate on the death of his widow in spite of an alienation made by the male owner, at least where twelve years have not elapsed between the said alienation and the owner's death or that of his widow.

[Cf. *Punjab Record*, Nos. 10 and 116 of 1890] ... 31

" " *Alienation by Muhammadan widow—Widow handing over property to her deceased husband's adopted son—Limitation Act, 1877, Articles 118 and 125.*—The plaintiffs sued for a declaration, after cancellation of an adoption, that an alienation made on the 2nd May 1883 by the widow of one K., who died fourteen years ago, leaving a widow and daughters, would not affect their (the daughters') rights after the widow's death.

The suit was purely a declaratory one, the widow being still alive, and admittedly entitled to give possession during her lifetime to whom she pleased.

Held, that the suit must be taken to be in substance the one referred to in Article 118, Schedule II, Limitation Act, 1877, and not that contemplated by Article 125, and was therefore barred by time.

There was, in fact, no alienation by the widow, in the true sense of the term, to which the plaintiffs could or need take exception. What the widow purported to do in 1883 was to hand over to K.'s rightful heir and adopted son, the property to which he should have been recorded the successor on K.'s death ... 45

" " *Schedule II, Article 103—Dower—Demand and refusal, nature of.*—The demand and refusal to pay dower must be made in clear and unambiguous language, otherwise Article 103, Schedule II of the Limitation Act, 1877, will not come into operation (cf. 15 B. L. R., 306) 63

" " *Schedule II, Articles 97 and 115—Suit to recover amount paid out of Court in execution of decree.*—The defendant, K. L., obtained a decree against plaintiff for Rs. 2,347 and employed the other defendant, K. R., to execute the decree as his agent under a formal power of attorney.

The plaintiff in the present suit alleged a payment of Rs. 900 in cash to the agent on 3rd February 1885.

The references are to the Nos. given to the cases in the "Record."

No.

On 2nd November 1887, execution of the decree was sued out without credit being given for the Rs. 900, and on 28th February 1888 K. L. denied the receipt of the money through his agent and declined to give credit for the amount.

On 22nd April 1889, the plaintiff (in the present suit) sued to recover the Rs. 900 alleged to have been paid.

Held, that the suit would lie and was governed either by Article 97 or 115, Schedule II of the Indian Limitation Act, 1877, and was within time

79

Limitation Act, 1877.—Section 23—Suit for custody of wife—Third person harbouring wife—Continuing wrong.—A third person who harbours a runaway wife is guilty of a continuing wrong, and under the operation of Section 23, Indian Limitation Act, 1877, a fresh period of limitation begins to run at every moment of time during which the wrong continues, the section being more comprehensive in this respect than the corresponding provision of the Act of 1871.

The limitation applicable to a suit by a husband for the custody of his wife is to be found in Articles 34, 35, Schedule II, Limitation Act, 1877.

Punjab Record, No. 60 of 1879 (F. B.), followed

80

" " *Abandonment of land—Extinguishment of proprietary rights.*—*Held*, by the Full Bench, that an owner of land who has abandoned it within twelve years previously to the institution by him of a suit for possession thereof, does not by such mere act of abandonment lose his proprietary rights. His title will prevail, provided that it has not been extinguished by the operation of the law of limitation

85

" " *Schedule II, Article 142—Suit for possession of land—Previous dispossession—Abandonment.*—The plaintiff sued on 6th November 1890 for possession of certain land in Palwal in the Gurgaon District, alleging it to be the ancestral property of his father, who had left Palwal some time before the year 1854, and died in 1880, in a village in the Ilaka of Jhansi, without having returned to Palwal.

Held, that the suit was barred by limitation. The Article of the Limitation Act, 1877, applicable was Article 142 under which the deceased owner, or any one claiming under him, had twelve years within which to sue for possession, to be reckoned from the date upon which the said owner discontinued possession. He had discontinued possession in 1844 and left Palwal for good.

The Privy Council decision reported as I. L. R., 17 Calc., 137 [s. c. *Punjab Record*, No. 23 of 1890] referred to and followed

109

" " *Articles 141 and 144—Suit by reversioner to contest alienation by Hindu widow, made when in possession of her deceased husband's property.*—When a Hindu widow has been in possession of her deceased husband's immoveable property on the usual widow's estate, the Article governing a suit by a reversioner suing after the widow's death to contest an alienation made by her as being without necessity, is Article 141 and not Article 144, Schedule II, Limitation Act, 1877

110

The references are to the Nos. given to the cases in the "Record."

No.

Limitation Act, 1877.—Mortgage—Mortgagee in possession—Farm of land by Collector for non-payment of revenue—Suit by assignee of mortgages for possession, on expiry of term of farm.—A mortgagee of two-thirds of certain lands obtained possession under his mortgage.

The proprietors having made default in payment of the land revenue on the other share of the land, and the mortgagee also refusing to pay the said revenue, the land was farmed by the Collector under the revenue law to H. S. for a term of ten years. The farm continued from 1875 to 1885, when the representative of the mortgagors obtained possession.

On 17th August 1889, the assignee of the mortgagee sued for possession under the mortgage.

Held, that the plaintiff's suit was barred by limitation under Article 142, Schedule II, Limitation Act, 1877, and that H. S. was not in possession on behalf of the mortgagee but on his own account ...

121

" " **Schedule II, Article 179—Decree made on a compromise that after expiration of fifteen years plaintiff would be entitled to possession.**—A decree was made in a suit in accordance with a compromise between the parties: the defendants were to remain in possession of the land in suit for fifteen years as mortgagees in lieu of their expenditure and losses during the plaintiff's absence, and on the expiration of the fifteen years the plaintiff was to obtain possession.

On the expiry of the fifteen years, the plaintiff applied for execution of decree asking for possession of the land.

Held, that the application for execution was governed by Article 179, Schedule II, Limitation Act, 1877, and was barred, the time beginning to run from the date of the decree.

Punjab Record, No. 43 of 1878 (F. B.), referred to and followed ...

126

" " **Article 44, Schedule II—Guardian and ward—Suit by minor on attaining majority to set aside a sale by person purporting to act as guardian.**—Article 44, Schedule II, Limitation Act, 1877, held inapplicable to a suit by a minor after attaining his majority for possession of immoveable property conveyed away during his minority by a person purporting to act as his guardian, where it appeared that such person was not really the minor's guardian, in fact or in law ...

135

" " **Schedule II, Article 142—Alienation by deceased sonless proprietor—Discontinuance of possession—Date on which cause of action arises.**—In a suit brought in 1890 by the plaintiffs for their share by inheritance in the estate of K., a childless proprietor, who died 2½ years before suit, it appeared that in 1874 K. had transferred his rights in the disputed land to defendant's father, and given him possession, which had continued with defendants and their father up to the time of suit.

Held, that the claim was barred by limitation under Article 142 of the 2nd Schedule of the Limitation Act, as K., from whom plaintiffs derived their right to sue, had discontinued possession in 1874, and more than twelve years had elapsed between that date and the filing of the present suit.

Punjab Record, No. 48 of 1885, and Nos. 10 and 116 of 1890, referred to ...

141

The references are to the Nos. given to the cases in the "Record."

No.

*Limitation Act, 1877.—Schedule II, Article 118—Suit to declare an adoption invalid or as having never in fact taken place.—Semble.—*The "alleged adoption" mentioned in Schedule II, Article 118, Limitation Act, 1877, must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiff or challenged as being invalid upon some ground of law or custom, which does not go the length of asserting that the adoption, as an adoption, is wholly impossible ... 144

M.

*Mafidar.—Death of mafidar—Resumption of mafi—Settlement made with heir or mafidar—Right of heir to retain possession against the owners.—*In a reference under Section 617, Civil Procedure Code, the Divisional Judge stated the point referred (with a full explanation) as follows:—

"When a *mafidar*, not being an owner of land, has during the continuance of his *mafi* grant a right (otherwise than as tenant) to retain possession of the *mafi* land against the owners and such *mafidar* has died and the *mafi* has been resumed, but the settlement has been made with an heir of the *mafidar*, has such heir the right (otherwise than as tenant) to retain possession against the owners" ?

Held, that the answer to the question, whether the heir is entitled to retain possession against the (original) owners after he has been settled with, depends entirely on the terms of the original grant to him by the owners and is unaffected by settlement operations ... 108

Mahant.—See Religious Institution.

Maintenance.—Custom—Unmarried daughter—Maintenance out of or succession to deceased father's estate—Hindu Jats, Ludhiana District.—Found, that among Hindu Jats of the Ludhiana District, custom recognises the right of the unmarried daughters to be maintained out of the estate of the deceased father, and even in some cases a right to possession of the estate until marriage ... 50

*Marriage brocage.—Indian Contract Act, 1872—Marriage brocage contract—Void agreement—Guarantee.—*S. betrothed his minor daughter to the plaintiff's son, who was also a minor, and N. the brother-in-law of S. entered into an agreement with the plaintiff's father by which he guaranteed that S. should celebrate a marriage between the boy and girl after the expiration of five and before the expiration of eight years. S. married his daughter elsewhere and the plaintiff sued N. for damages.

The plaintiff's father D. betrothed his marriageable daughter to N. receiving Rs. 1,200 from him: the marriage took place shortly after the betrothal. S. agreed to give his infant daughter to the plaintiff's son, and N. guaranteed the performance of S.'s undertaking.

The Divisional Judge held the agreement to be a contract of guarantee.

Held, that there was no enforceable agreement of guarantee: the agreement was entirely for the benefit and satisfaction of N. himself and his promise was *nudum pactum*. He could in fact do nothing more than endeavour to induce S. to marry his daughter to the plaintiff's son and if the parties contemplated that he should purchase S.'s consent, such an undertaking on his part would be void according

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to the view expressed in the Full Bench decision reported as *Punjab Record*, No. 128 of 1889 112

Menials.—See Village menials.

Mesne Profits.—*Punjab Courts Act, Section 39 (b) and (c)*—*Value of suit*—*Mesne profits*—*Course of appeal*.—The plaintiffs sued for mesne profits alleged to have been realised by a Receiver. The plaintiffs, for the purposes of Section 50, Civil Procedure Code, valued the relief sought, approximately, at Rs. 2,000. They were decreed Rs. 3,405-15-6, and they appealed for Rs. 1,946 more. The defendants also appealed against the whole decree.

Held, that the appeal from the District Judge's decree lay to the Divisional Court and not to the Chief Court.

Punjab Record, No. 63 of 1891, referred to 40

Minor.—*Guardian and ward*—*Lease of ward's property to guardian*—*Introduction of outsider into management of ancestral holding*.—The District Judge appointed L. S., a connection by marriage, guardian of the property and person of a minor, on the ground, apparently, that he was willing to take the minor's land on a lease of Rs. 1-3-0 per ghumao instead of Re. 1-0-0 offered by K. S., the minor's grand-uncle.

Held, that the appointment must be cancelled. Not only is a lease to a guardian of his ward's land most objectionable, but also the effect of the District Judge's order would be to transfer the control of a large share in an ancestral holding from the family of the co-sharers to the family of another tribe, i. e., to the husband of the father's sister. Such an order would only be justified if it were clearly proved that the members of the minor's own family were unfit to be his guardian. 78

„ *Regulation XVII of 1806*—*Application to foreclose*—*Minor*—*Notice how to be served*.—*Held*, that the presentation of a written petition under Section 8, Regulation XVII of 1806, by a person acting under a general power of attorney from the holder of a deed of mortgage, was a valid one.

Held, further, that the copy of the application and parwana referred to in the section in question were sufficiently served on a minor mortgagee, for whom no guardian had been appointed under the Act, by service on his brother with whom he lived.

2 N. W. P. Repts., 444, followed 94

„ *Indian Limitation Act, 1877, Article 44, Schedule II*—*Guardian and ward*—*Suit by minor on attaining majority to set aside a sale by person purporting to act as guardian*.—Article 44, Schedule II, Limitation Act, 1877, held inapplicable to a suit by a minor after attaining his majority for possession of immoveable property conveyed away during his minority by a person purporting to act as his guardian, where it appeared that such person was not really the minor's guardian, in fact or in law 135

Misjoinder.—*Civil Procedure Code, Chapter III*—*Misjoinder*—*Trespass*—*Separate and independent acts of defendants*.—Seventeen of the village proprietors sued thirty-six persons—co-sharers and non-proprietors—for a

The references are to the Nos. given to the cases in the "Record."

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declaration that the defendants were not entitled to enclose certain lands of the village or to erect buildings thereon, and also praying for the demolition of the buildings so erected and restoration of the land to its original condition.	
The building by each defendant was his separate and independent act.	
<i>Held</i> , on further appeal (the objection was taken in the Court of first instance) that the suit was bad for misjoinder.	
[Cf. I. L. R., 14 Calc., 435.]	127
<i>Mortgage</i> .—See Occupancy Tenant.	
„ <i>Mortgage deed—Interest—Rights of mortgagee—Charge upon mortgaged property</i> .—Where there is a clear agreement that a mortgagor will pay interest year by year and that he will not be entitled to redeem without paying the whole amount of the principal and interest due by him, such principal and interest form a charge upon the mortgaged property to which effect must be given.	
<i>Punjab Record</i> , No. 57 of 1888, and No. 8 of 1890, referred to and explained.	
I. L. R., 19 Calc., 19, referred to	28
„ <i>Redemption of mortgage—Indivisible transaction—One co-sharer cannot redeem his share</i> .—In the absence of a special contract to the contrary, a mortgage is one indivisible transaction, and must be redeemed as a whole or not at all. A co-sharer cannot sue to redeem his own share only	42
„ <i>Regulation XVII of 1806—Service of notice—Service on each mortgagor</i> .—To establish a sufficient compliance with the provisions of Regulation XVII of 1806, it is necessary that, if there be more than one mortgagor, each mortgagor should be served with a copy of the mortgagee's petition to foreclose, service upon one of the mortgagor's alone being inadequate	51
„ <i>Suit by mortgagee for possession—Suits Valuation Act, 1887—Value for purposes of jurisdiction</i> .—A suit by a mortgagee seeking to recover possession of land under his mortgage is a suit falling within the rules made under the Suits Valuation Act, 1887, which provide that in suits for possession of land under clause 5, Section 7, Court Fees Act, 1870, the value of the suit for purposes of jurisdiction is thirty times the land revenue.	
The ruling in <i>Punjab Record</i> , No. 1 of 1887, that in a suit by a mortgagee for possession, the subject matter was not the land itself but the mortgagee's interest therein under the mortgage, must be deemed to be superseded by the passing of the Suits Valuation Act and the rules made thereunder	56
„ <i>Mortgage—Absence of covenant to pay interest after due date—Allowance of, by way of damages—Charge</i> .—A deed of mortgage contained no covenant for payment of interest <i>post diem</i> .	
<i>Held</i> , that interest could notwithstanding be allowed by way of damages—in so far as such damages were within limitation (six years)—and be declared a charge upon the mortgaged property ...	73

The references are to the Nos. given to the cases in the "Record."

No.

Mortgage.—*Regulation XVII of 1806—Application to foreclose—Minor—Notice how to be served.*—*Held*, that the presentation of a written petition under Section 8, Regulation XVII of 1806, by a person acting under a general power of attorney from the holder of a deed of mortgage, was a valid one.

Held, further, that the copy of the application and parwana referred to in the section in question were sufficiently served on a minor mortgagee, for whom no guardian had been appointed under the Act, by service on his brother with whom he lived.

2 N. W. P. Reps., 444, followed ... 94

" *Jurisdiction—Revision—Refusal of District Judge to issue a notice under Regulation XVII of 1806.*—The District Judge refused to issue a notice under Regulation XVII of 1806, holding that the mortgage deed propounded was not a mortgage by conditional sale and therefore not within the scope of the Regulation.

The plaintiff applied for revision.

Held, overruling the District Judge as to the nature and construction of the document, that his order was under the circumstances open to revision.

I. L. R., 3 All., 576, referred to and followed ... 119

Muhammadan Law.—*Presumption of death—Rule of Muhammadan law superseded by Evidence Act.*—The rule of Muhammadan law which refuses to presume a person dead until ninety years from the date of his birth, is a rule of evidence, and not of substantive law, and is superseded in all cases in which the question of the presumption whether a man is alive or dead, arises under Section 108, Indian Evidence Act (cf. also Section 2 of the Act) ... 42

" *Alienation by Muhammadan widow—Widow handing over property to her deceased husband's adopted son—Limitation Act, 1877, Articles 118 and 125.*—The plaintiffs sued for a declaration, after cancellation of an adoption, that an alienation made on the 2nd May 1883 by the widow of one K. who died fourteen years ago, leaving a widow and daughters, would not affect their (the daughters') rights after the widow's death.

The suit was purely a declaratory one, the widow being still alive, and admittedly entitled to give possession during her lifetime to whom she pleased.

Held, that the suit must be taken to be in substance the one referred to in Article 118, Schedule II, Limitation Act, 1877, and not that contemplated by Article 125, and was, therefore, barred by time.

There was, in fact, no alienation by the widow, in the true sense of the term, to which the plaintiffs could or need take exception. What the widow purported to do in 1883 was to hand over to K.'s rightful heir, and adopted son, the property to which he should have been recorded the successor on K.'s death ... 45

" *Custom—Succession—Prostitutes of Lahore—Muhammadan law.*—*Found*, in a suit the parties to which were professed prostitutes residing at Lahore, that no special custom was proved regulating the succession to the property of a collateral, and that, therefore, Muhammadan law must be applied ... 62

The references are to the Nos. given to the cases in the "Record."

No.

Municipal Committee.—Nuisance—Public latrine—Injunction—Act XIII of 1884, Section 68 (2) (a)—Statutory authority of Municipal Committee—Powers and duties of Committee.—In answer to a suit brought against the Municipal Committee of Delhi for an injunction to prevent, on the ground of nuisance, the use of a public latrine recently erected by the Committee, it was pleaded that the defendants were acting under statutory authority and that the alleged nuisance (if any) being a necessary consequence of the use of the powers and duties imposed on the Committee by the Legislature, could not be restrained by injunction.

Held, that the power claimed by the Committee under Section 68, sub-section (2) (a) of the Punjab Municipal Act, 1884, did not exist: that that enactment contained no express authorization to the defendant to construct public latrines. The section merely rendered it lawful for the Committee to apply their funds towards payment, *inter alia*, of the charges and expenses incidental to the construction, maintenance, improvement, cleansing and repair of latrines: it implied a discretionary power to construct public necessities, but it conferred no compulsory power to acquire land for the purpose of erecting such buildings thereon in any specific locality or at any place which might be deemed suitable by the Committee.

Punjab Record, No. 106 of 1888 (Lahore slaughter-house case) referred to and followed

103

N.

Nuisance—Public Latrine.—See Municipal Committee.

O.

Occupancy tenant.—Tenancy Act, 1887—Unauthorised alienation by occupancy tenant—Tenant's right to recover possession from landlord.—When an occupancy tenant has made an unauthorised alienation of his holding including the giving of possession to the alienee, and the landlord has sued successfully to have the alienation declared void and to recover possession from the alienee, it is not a good answer to a suit by the alienor against the landlord to obtain re-entry on his holding, that the plaintiff is not able to show that he is no longer bound by the contract, either because the alienee has taken back his money, or because the contract has been put an end to in some other way.

Punjab Record, No. 74 of 1884, decided with reference to the provisions of the Tenancy Act, 1868, not followed

17

Pre-emption—Transferable rights of occupancy—Section 10, Punjab Laws Act—Right created by Statute or Contract—Perpetual lease whether tantamount to sale.—The provision of Section 10, Punjab Laws Act, 1872, (as amended), that the right of pre-emption shall *prima facie* be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands, applies not only to sales by occupancy tenants, but is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration.

A right of occupancy may be transferable within the meaning of Section 10, Punjab Laws Act, 1872, (as amended), either because a power to transfer is given by the Tenancy Act, or because there is an

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agreement between the landlord and tenant excluding the operation of such of the provisions of the Act as would otherwise prevent alienation. In the present case, the right of occupancy being created by contract would, ordinarily, and in the absence of express agreement, be non-transferable; but in conferring the right, the landlord had expressly granted full power of alienation and had thus created or sold a transferable right.

Semble.—A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale (I. L. R., 15 Calc., 184, referred to)

43

Occupancy tenant.—Jurisdiction of Civil Court—Mortgage by occupancy tenant—Mortgagee to receive half net profits without possession—Punjab Tenancy Act, 1887, Section 77 (k).—The defendant, a tenant with rights of occupancy, mortgaged his land to the plaintiff on the understanding that the mortgagor should retain possession and the mortgagee receive half the net profits of the tenancy.

The defendant withheld from the plaintiff his share of the profits; hence the present suit.

Held, that the suit was cognizable by the Civil Court, the plaintiff and defendant not being co-sharers "in an estate or holding," and clause (k), sub-section (3), Section 77, Punjab Tenancy Act, 1887, being therefore inapplicable

70

Offerings: suit for share of.—See Small Cause.

P.

Partition—Hindu law—Joint undivided family—Survivorship—Principles governing question whether a partition has taken place.—Plaintiff sued to recover the amount of principal and interest alleged to be due on a bond executed by K. S., deceased, who died in 1884, leaving a widow and two brothers, all three being made defendants in the suit.

The first Court decreed the claim against the two brothers only to the extent of the principal sum named in the bond, together with simple interest.

The two brothers appealed to the Chief Court contending that they and the deceased formed a joint Hindu family, and that they consequently took the whole of the joint property by survivorship, and were therefore not liable for the present debt of the deceased.

Held, after enquiry upon remand, that the previous litigation which had taken place between the parties effected such a separation of interests as to have destroyed the jointness of the estate according to the principle enunciated by the Privy Council in *Appovier's* case and other subsequent decisions.

The principles and authorities governing the question whether a partition can in any case be held to have taken place, in fact or in law, stated and discussed

2

„ *Civil Court—Suit for declaration that land was not subject to partition—Jurisdiction.*—The plaintiff sued asking for (1) a declaration that a holding of 52 ghamaos 6 kanals and 19 marlas was not subject to partition; (2) any other relief that the Court might grant.

The references are to the Nos. given to the cases in the "Record."

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The lower Courts declined to entertain the suit on the ground that it called in question the order of a Revenue Officer, and that no question of title had been referred to a Civil Court.

Held, that in the absence of an adjudication by the Revenue Officer himself under Section 117, Punjab Land Revenue Act, 1887, the suit was cognizable by the Civil Courts 39

Partition.—Jurisdiction of Civil Court—Section 158 (2) (xvii), Land Revenue Act, 1887—Allegation of error in partition proceedings.—The plaintiffs sued for a declaration that they were owners of certain land contained in three specified *khassra* numbers of which they alleged that they were in possession under a partition made by the Revenue authorities in 1884.

The final record of the partition showed that the land fell to the defendant's share, but this it was alleged was owing to an error in the preparation of the final papers.

Held, that the suit distinctly raised a question connected with, or arising out of, proceedings for partition within the meaning of Section 158, sub-section (2) (xvii), Punjab Land Revenue Act, 1887, and, that the question was not one "as to title in any of the property of which partition is sought" within the same clause, and that the jurisdiction of the Civil Courts was ousted 88

Pleadings.—Suit for land awarded at partition of whole culturable land of village—Parties—Duty of appellate Court.—The plaintiff sued eleven defendants for possession of a small corner of *gorah* land which had been awarded to him at a partition of the whole culturable land of the village.

The Court of first instance impleaded the whole proprietary body as co-defendants.

In his appeal to the Divisional Court, the plaintiff again made the eleven original defendants, respondents.

The Divisional Judge rejected the appeal on the ground (*inter alia*) that the whole of the proprietary body had not been made respondents.

Held, that the Divisional Judge was not justified in rejecting the appeal for want of parties, there being no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by Appellate Courts. Two courses were open to the Court :

- (1) to decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court ; or
- (2) to have used the power given it by Section 559, Civil Procedure Code, if the Court considered it necessary, and to have directed that the other defendants be made respondents.

Held, also, that the suit (which was instituted while the Punjab Land Revenue Act, 1871, was in force) was not excluded from the cognizance of the Civil Courts by the provisions of that Act ... 5

" *Par delictum—Party estopped from pleading his own fraud.*—The plaintiff sued for possession of half a house which he alleged was the joint property of himself and the defendant : the latter relied upon a

The references are to the Nos. given to the cases in the "Record."

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registered deed of sale to him from the plaintiff, purporting to sell his (plaintiff's) interest in the house. The plaintiff replied that this was a fictitious transaction entered into in fraud of his creditors.	
<i>Held</i> , that the plaintiff was precluded by the rule of <i>par delictum</i> from relying on such an allegation	38
Pleadings. — <i>Jurisdiction</i> — <i>Small Cause Court</i> — <i>Withdrawal of suit pending in, and determined by District Judge</i> — <i>Objection as to jurisdiction.</i> —In a suit heard and determined by a competent Court the parties having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial proceedings, which if objected to at the time, would have led to the dismissal of the suit.	
<i>Ledgard v. Bull</i> , I. L. R., 9 All., 191, (Privy Council Case) referred to and followed	118
Pre-emption. — <i>Punjab Laws Act, Section 12, clause (d)</i> — <i>Construction</i> — <i>Suits by landowners of patti severally.</i> —When suits for pre-emption have been filed at different times by persons equally entitled to pre-emption under clause (d), Section 12, Punjab Laws Act, but no decree has been obtained by any claimant before the later suit has been instituted, the general rule applicable is, not that the plaintiff who first succeeds in obtaining a decree will be entitled to retain the whole of the property, but that in the absence at least of some special bar, each claimant will be entitled to a decree for a proportionate share of the property on payment of a proportionate share of the purchase money ...	29
" <i>Limitation Act, 1877, Schedule II, Articles 10 and 120</i> — <i>Mortgage by conditional sale</i> — <i>Foreclosure proceedings and suit for possession</i> — <i>Pre-emption.</i> —The limitation applicable to a suit for pre-emption of an undivided share in a joint holding which does not admit of physical possession being taken, and in which the purchaser acquires his title by foreclosure proceedings under Regulation XVII of 1806 and a subsequent suit for possession, is six year, under Article 120, Schedule II of the Limitation Act, 1877, Article 10 having no application to such a state of facts	34
" <i>Transferable rights of occupancy</i> — <i>Section 10, Punjab Laws Act</i> — <i>Right created by Statute or Contract</i> — <i>Perpetual lease, whether tantamount to sale.</i> —The provision of Section 10, Punjab Laws Act, 1872 (as amended), that the right of pre-emption shall <i>primâ facie</i> be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands, applies not only to sales by occupancy tenants, but is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration.	
A right of occupancy may be transferable within the meaning of Section 10, Punjab Laws Act, 1872 (as amended), either because a power to transfer is given by the Tenancy Act, or because there is an agreement between the landlord and tenant excluding the operation of such of the provisions of the Act as would otherwise prevent alienation. In the present case, the right of occupancy being created by contract would ordinarily, and in the absence of express agreement, be non-transferable; but in conferring the right, the landlord had expressly granted full power of alienation and had thus created or sold a transferable right.	

The references are to the Nos. given to the cases in the "Record."

	No.
<i>Sembla.</i> —A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale (I. L. R., 15 Calc., 184, referred to)	43
<i>Pre-emption.</i> — <i>Agreement regulating rights of pre-emption</i> — <i>Not authorised by Punjab Laws Act</i> — <i>Land-owner in dheri or sub-division of patti.</i> —An agreement recorded in the <i>Wajib-ul-arz</i> between the proprietors of a village as to the persons to whom the right of pre-emption would belong in future, cannot prevail against the provisions of Section 12, Punjab Laws Act, 1872 (as amended), which give a detail of the persons to whom the right to pre-empt property in a village belongs, in the absence of a custom to the contrary. Such agreements are not saved by the section, and the law must therefore prevail against them.	
<i>Quere.</i> —Whether the provisions of Section 12, Punjab Laws Act, are applicable to a <i>dheri</i> or sub-division of a <i>patti</i>	44
" <i>Decree for pre-emption</i> — <i>Payment of purchase money in foreign circle notes</i> — <i>Punjab Laws Act, Section 17 and Civil Procedure Code, Section 214.</i>	
A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any objection, and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.	
<i>Held</i> , that the order of the lower Court was correct. Currency notes are money in the ordinary acceptance of the term, although they may be notes of a different circle from that in which they are tendered. The words "purchase money" are not defined, and there is nothing either in Section 17, Punjab Laws Act, or in Section 214, Civil Procedure Code, 1882, to put a restricted or technical meaning upon them. <i>Punjab Record</i> , No. 70 of 1890, distinguished.	
<i>Held</i> , also, that an appeal lay from the order in question under Section 244 (c), Civil Procedure Code, the order relating to the execution of the decree	67
" <i>Punjab Laws Act, 1872</i> — <i>Pre-emption</i> — <i>Compensation for improvements made by original purchaser</i> — <i>Form of decree.</i> —The practice of the Court to award compensation for improvements to a vendee who has made them in good faith, or who may appear to be equitably entitled to it, followed and affirmed.	
<i>Punjab Record</i> , Nos. 34 of 1875, 74 of 1875 and 38 of 1889, referred to.	
<i>Per BULLOCK, J.</i> —The decree in such cases should provide separately for the payment of the pre-emption money and the payment of compensation, and that payment of the former within the time fixed in the decree should save the decree from forfeiture, though the compensation be not paid (cf. Section 214, Civil Procedure Code) ...	91
" <i>Punjab Laws Act, 1872</i> — <i>Pre-emption in village</i> — <i>Custom</i> — <i>Construction of administration paper to effect that no sale or mortgage had ever occurred.</i> —The village administration paper framed at first settlement recorded that no sale or mortgage of land had ever occurred in	

The references are to the Nos given to the cases in the "Record."

No.

the village, and then prescribed that any one wishing to sell or mortgage his land must make the first offer of it to the *shurka shikmi wa yak jaddi*.

Held, in claims for pre-emption relying on this entry, that neither the entry, nor the other evidence, established that a custom regulating pre-emptive rights existed in the village, and that the claim must be disposed of in accordance with the provisions of Act IV of 1872 (Punjab Laws Act)

Pre-emption.—*Punjab Laws Act, 1872, Section 11—Pre-emption in sub-division of town—Muhalla Bhogi in town of Jagraon.*—*Found*, that the right of pre-emption was not proved to exist in Muhalla Bhogi in the town of Jagraon.

If a town be composed of several sub-divisions, the fact that the custom of pre-emption is found to exist in one of such sub-divisions does not lead *per se* to the presumption that it exists in another.

Punjab Record, No. 165 of 1888 and No. 170 of 1889, referred to ...

„ *Punjab Laws Act, 1872—Pre-emption—Money paid into Court by successful pre-emptor and withdrawn by original purchaser—Reduction of price by Appellate Court—Interest on excess in hands of original purchaser.*—A pre-emptor paid into Court a sum of money in satisfaction of the decree passed in his favour which sum was withdrawn by the original purchaser.

On appeal, the pre-emptor obtained a reduction of the price to be paid for the land. The original purchaser withdrew from the Court the money allowed, knowing that the pre-emptor asserted that it was not due and that he had appealed, the original purchaser thus enjoying the use of the money for a long period.

Held, that under such circumstances there was no reason why the defendant (the original purchaser) should not be compelled to pay interest on the excess sum which he had enjoyed which the Court allowed at 6 per cent. per annum.

L. R., 3 P. C., 465, and I. L. R., 7 All., 432, referred to ...

„ *Punjab Laws Act, 1872—Pre-emption—Bhai nazdiki—Co-sharers in joint undivided immoveable property.*—*Held*, that the widow of a deceased collateral did not fall within the category of "bhai nazdiki," who under the terms of the *Wajib-ul-arz*, were entitled to pre-emption.—*Cf Punjab Record*, No. 196 of 1889.

Held, also, that the land in suit was not joint undivided immoveable property within the meaning of Section 12 (a), Punjab Laws Act 1872: the land had been divided so far as it was possible to divide it

That the property was a portion of what once formed a joint estate conferred no prior right of pre-emption

Presumption of death.—*See Evidence.*

Priority among decret-holders.—*See Execution of Decree.*

Probate.—*Probate and Administration Act, 1881—Universal or residuary legatee Grant of probate to, with copy of the will annexed, under Section 19 of the Act.*—The testator, a Hindu, left a will disposing of his property follows: two items mentioned in the list of property given in the w

The references are to the Nos. given to the cases in the "Record."

No.

to be dedicated to charitable uses and all the rest of the property to go to his wife "besides whom I have no other heir to succeed to my property"; provision was then made for the maintenance of an adopted son; and, lastly, two persons were appointed by name "to act as sarbarahs for my wife."

No executor was appointed by the will.

Held, that the widow was not entitled to probate as an executrix appointed by necessary implication within the meaning of Section 7 of Act V of 1881, but to letters of administration with the will annexed, under Section 19 of the Act, as universal or residuary legatee.

Held, also, that the sarbarahs were not executors named in the will and that such was not the testator's intention.

Held, further, per Rivaz, J. The District Judge was correct in excluding from the inquiry any question relating to the capacity of the testator to dispose of his property at all by will, or as to the validity (by law or custom) of any of the provisions contained in the will ...

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Proprietary rights.—See Extinguishment of Proprietary Rights.

Public place.—See Criminal Procedure Code, 1882.

Punjab Courts Act, 1884.—*Right to use of water—Land-suit—Punjab Courts Act, 1884, Section 3—Appeal.*—The plaintiff sued to establish his right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4 of the Punjab Tenancy Act, 1887: no claim was made to any share in the land occupied by the canal, or in the canal as a whole.

Held, (Roe, J., doubting), that the suit was not a "land-suit" as defined in Section 3, Punjab Courts Act, 1884 (as amended) ...

1

" *Jurisdiction—Further appeal—Land-suit—Claim for share in an orchard, i.e., of the fruit trees.*—A suit for possession of a half share in an orchard, that is, in the fruit trees, is not a "land-suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884.

Punjab Record, No. 119 of 1890, referred to ...

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" *"Land-suit"—Village graveyard—Further appeal.*—The plaintiffs sued, alleging that 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that the defendants had brought 6 kanals of it under cultivation two years previously, and made thorn enclosures and taken possession of certain portions.

Held, that the suit was not a land-suit, and that the suit being valued at Rs. 150, a further appeal to the Chief Court was not competent without a Certificate from the Divisional Judge under Section 40, Sub-section 1 (d), Punjab Courts Act ...

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" *"Punjab Courts Act, Section 39 (b) and (c)—Value of suit—Mesne profits—Course of appeal.*—The plaintiffs sued for mesne profits alleged to have been realised by a Receiver. The plaintiffs, for the purposes of Section 50, Civil Procedure Code, valued the relief sought, approximately, at Rs. 2,000. They were decreed Rs. 3,405-15-6, and they appealed for Rs. 1,946 more. The defendants also appealed against the whole decree.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that the appeal from the District Judge's decree lay to the Divisional Court and not to the Chief Court.

Punjab Record, No. 63 of 1891, referred to ... 40

Punjab Courts Act, 1884.—*Small cause—Suit for share of offerings received for a specified period.*—A suit for a certain share of offerings received at a shrine for a certain period, the plaintiffs claiming as rightful successors to the former incumbent, the defendants being, one, the Manager of the Golden Temple, who held the money in dispute in safe custody only, and the other defendant a rival claimant, who set up a title as donee, is a "small cause." ... 84

" " *Suits Valuation Act* 1887—*Rules under—Suit to declare an alienation of land to be not binding after grantor's death—Further appeal—Value of suit Rs. 1,000, or upwards—Punjab Courts Act*, 1884, Section 40.—The plaintiffs sued for a declaratory decree that an alienation by a childless proprietor would not affect their reversionary interests in the land, the subject of the alienation: the grantor was alive and no consequential relief was prayed for.

The alienation challenged by the plaintiffs purported to be for Rs. 1,300: the value of the land calculated at 30 times the revenue was Rs. 770.

Held, that no further appeal to the Chief Court was competent in the absence of an application to the Divisional Judge for a Certificate under Section 40, sub-section (1) (d), *Punjab Courts Act*, 1884, the value of the suit for purposes of jurisdiction being less than Rs. 1,000, and both Courts having concurred in decreeing the claim.

The suit as brought, though it fell within the description of claim mentioned in No. II of the Rules issued under Part II of the *Suits Valuation Act*, was subject to the proviso to that Rule, and as the subject of the alienation impugned was land as specified in Section 3 of the Act, and was valued for purposes of jurisdiction at 30 times the revenue, or Rs. 770, according to the rules made under that section, it followed from Section 4 of the same Act that the value of the present claim could not be held to be in excess of that sum.

Held, also, that the lower Appellate Court's decree could not be said to involve *directly*, some claim to, or question respecting, property of Rs. 1,000 or upwards in value within the meaning of Section 40, sub-section (1) (a), of the Courts Act ... 145

Punjab Laws Act, 1872.—*Section 12, clause (d)—Construction—Suits by landowners of patti severally.*—When suits for pre-emption have been filed at different times by persons equally entitled to pre-emption under clause (d), Section 12, *Punjab Laws Act*, but no decree has been obtained by any claimant before the later suit has been instituted, the general rule applicable is, not that the plaintiff who first succeeds in obtaining a decree will be entitled to retain the whole of the property, but that in the absence at least of some special bar, each claimant will be entitled to a decree for a proportionate share of the property on payment of a proportionate share of the purchase money ... 29

" " *Pre-emption—Transferable rights of occupancy—Section 10, Punjab Laws Act—Right created by Statute or Contract—Perpetual lease whether tantamount to sale.*—The provision of Section 10, *Punjab Laws Act*, 1872 (as amended), that the right of pre-emption shall

The references are to the Nos. given to the cases in the "Record."

No.

prima facie be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands, applies not only to sales by *occupancy tenants*, but is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration.

A right of occupancy may be transferable within the meaning of Section 10, Punjab Laws Act, 1872 (as amended), either because a power to transfer is given by the Tenancy Act, or because there is an agreement between the landlord and tenant excluding the operation of such of the provision of the Act as would otherwise prevent alienation. In the presents case, the right of occupancy being created by contract would, ordinarily, and in the absence of express agreement be non-transferable; but in conferring the right, the landlord had expressly granted full power of alienation and had thus created or sold a transferable right.

Semle.—A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale (I. L. R., Calc. 184, referred to)

43

Punjab Laws Act, 1872.—Agreement regulating rights of pre-emption—Not authorized by Punjab Laws Act—Land-owner in dheri or sub-division of patti.—An agreement recorded in the *Wajib-ul-arz* between the proprietors of a village as to the persons to whom the right of pre-emption would belong in future, cannot prevail against the provisions of Section 12, Punjab Laws Act, 1872 (as amended), which give a detail of the persons to whom the right to pre-empt property in a village belongs, in the absence of a custom to the contrary. Such agreements are not saved by the section, and the law must therefore prevail against them.

Quare.—Whether the provisions of Section 12, Punjab Laws Act, are applicable to a *dheri* or sub-division of a *patti*

44

Decree for pre-emption—Payment of purchase money in foreign circle Notes—Punjab Laws Act, Section 17, and Civil Procedure Code, Section 214.—A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any objection and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.

Held, that the order of the lower Court was correct. Currency notes are money in the ordinary acceptation of the term, although they may be notes of a different circle from that in which they are tendered. The words "purchase money" are not defined, and there is nothing either in Section 17, Punjab Laws Act, or in Section 214, Civil Procedure Code, 1882, to put a restricted or technical meaning upon them. *Punjab Record*, No. 70 of 1890, distinguished.

Held, also, that an appeal lay from the order in question under Section 244 (c), Civil Procedure Code, the order relating to the execution of the decree

67

The references are to the Nos. given to the cases in the "Record."

No.

Punjab Laws Act, 1872.—Pre-emption—Compensation for improvements made by original purchaser—Form of decree.—The practice of the Court to award compensation for improvements to a vendee who has made them in good faith, or who may appear to be equitably entitled to it, followed and affirmed.

Punjab Record Nos. 34 of 1875, 74 of 1875 and 38 of 1889, referred to.

Per BULLOCK, J.—The decree in such cases should provide separately for the payment of the pre-emption money and the payment of compensation, and that payment of the former within the time fixed in the decree should save the decree from forfeiture, though the compensation be not paid. (Cf. Section 214, Civil Procedure Code). ...

91

" „ **Pre-emption in village—Custom—Construction of administration paper to effect that no sale or mortgage had ever occurred.**—The village administration paper framed at first settlement recorded, that no sale or mortgage of land had ever occurred in the village, and then prescribed that any one wishing to sell or mortgage his land must make the first offer of it to the *shurka shikmi wa yak jaddi*.

Held, in claims for pre-emption relying on this entry, that neither the entry, nor the other evidence, established that a custom regulating pre-emptive rights existed in the village, and that the claim must be disposed of in accordance with the provisions of Act IV of 1872 (Punjab Laws Act) ...

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" „ **Section 11—Pre-emption in sub-division of town—Muhalla Bhogi in town of Jagraon.**—*Found*, that the right of pre-emption was not proved to exist in Muhalla Bhogi in the town of Jagraon.

If a town be composed of several sub-divisions, the fact that the custom of pre-emption is found to exist in one of such sub-divisions does not lead *per se* to the presumption that it exists in another.

Punjab Record, No. 165 of 1888 and No. 170 of 1889, referred to ...

100

" „ **Pre-emption—Money paid into Court by successful pre-emptor and withdrawn by original purchaser—Reduction of price by Appellate Court—Interest on excess in hands of original purchaser.**—A pre-emptor paid into Court a sum of money in satisfaction of the decree passed in his favour, which sum was withdrawn by the original purchaser.

On appeal, the pre-emptor obtained a reduction of the price to be paid for the land. The original purchaser withdrew from the Court the money allowed, knowing that the pre-emptor asserted that it was not due and that he had appealed,—the original purchaser thus enjoying the use of the money for a long period.

Held, that under such circumstances there was no reason why the defendant (the original purchaser) should not be compelled to pay interest on the excess sum which he had enjoyed, which the Court allowed at 6 per cent. per annum.

L. R., 3 P. C., 465, and I. L. R., 7 All., 432, referred to ...

111

" „ **Pre-emption—Bhai nazdiki—Co-sharers in joint undivided immoveable property.**—*Held*, that the widow of a deceased collateral did not fall within the category of "bhai nazdiki," who, under the terms of the *Wajib-ul-arz*, were entitled to pre-emption.—*Cf. Punjab Record*, No. 196 of 1889.

The references are to the Nos. given to the cases in the "Record."

No.

Held, also, that the land in suit was not joint undivided immoveable property within the meaning of Section 12 (a), Punjab Laws Act, 1872 : the land had been divided so far as it was possible to divide it.

That the property was a portion of what once formed a joint estate conferred no prior right of pre-emption ... 131

R.

Registration Act, 1877—Mortgage for Rs. 400—Subsequent sale for additional sum of Rs. 99-8-0—Registration compulsory or optional.—The plaintiffs mortgaged their occupancy rights in certain land for Rs. 400. They subsequently obtained a further sum of Rs. 99-8-0 from the mortgagees, selling to them out and out their occupancy rights by an unregistered deed of sale, the material part of which was as follows:—

Whereas we own the occupancy rights in 17 ghumaos 2 kanals 1 marla of land which are already mortgaged for Rs. 400 to N. and P., we have now taken a further sum of Rs. 99-8-0 and have absolutely sold the said occupancy rights.

Held, that the registration of the document was optional ... 16

Regulation XVII of 1806.—Service of notice—Service on each mortgagor.—To establish a sufficient compliance with the provisions of Regulation XVII of 1806, it is necessary that, if there be more than one mortgagor, each mortgagor should be served with a copy of the mortgagee's petition to foreclose, service upon one of the mortgagors alone being inadequate ... 51

" *Application to foreclose—Minor—Notice how to be served.*—*Held*, that the presentation of a written petition under Section 8, Regulation XVII of 1806, by a person acting under a general power of attorney from the holder of a deed of mortgage was a valid one.

Held, further, that the copy of the application and parwana referred to in the section in question were sufficiently served on a minor mortgagee, for whom no guardian had been appointed under the Act, by service on his brother with whom he lived.

2 N.-W. P. Repts., 444, followed ... 94

" *Jurisdiction—Revision—Refusal of District Judge to issue a notice under Regulation XVII of 1806.*—The District Judge refused to issue a notice under Regulation XVII of 1806, holding that the mortgage deed propounded was not a mortgage by conditional sale and therefore not within the scope of the Regulation.

The plaintiff applied for revision.

Held, overruling the District Judge as to the nature and construction of the document, that his order was under the circumstances open to revision.

1 L. R., 3 All., 576, referred to and followed ... 119

Religious Institution.—Golden Temple, Amritsar—Succession of Gaddi-nashin—Custom as to Survivorship.—In determining the right of succession to the office of *gaddi-nashin*, the only law to be observed is to be found in the custom and practice, which must be proved by evidence.

The references are to the Nos. given to the cases in the "Record."

No.

Hitherto the rule of succession in the case of the Darbar Sahib, or Golden Temple, at Amritsar, has been that the *gaddi-nashins* have nominated successors, who have been installed in each case without objection.

Held, that no good grounds existed for applying the doctrine of survivorship to a case such as this, their being no analogy between three *gaddi-nashins*, who were to all intents and purposes separate and not joint, and the case of an undivided Hindu family among whom the doctrine of survivorship prevails.

Held, also, that it would not be just or equitable to reduce the customary number of *gaddi-nashins* from three to two, merely to benefit the plaintiffs and to the detriment of the institution and its supporters

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Religious Institution.—*Dharmasala*—*Right of worshipper at, to contest alienation of property attached to*—*Application of Section 539, Civil Procedure Code.*—The plaintiffs were worshippers at a *Dharmasala* and interested in the maintenance of the institution and preservation of the property intact.

Held, that in this capacity they had a *locus standi* to challenge certain alienations of property alleged and found to be *wagf* and attached to the *Dharmasala*, not as self-constituted representatives of the body of worshippers, who should have obtained an order under Section 20, Civil Procedure Code, but as persons themselves interested in the preservation of the property.

Held, further that Section 539, Civil Procedure Code, has no application to a suit of this description

66

" " *Right to sue*—*Habitual worshipper at mosque*—*Ejectment of trespasser.*—In a suit by one who was a habitual worshipper at a certain Muhammadan mosque, which he was also a neighbour and a supporter or well-wisher, for the ejectment of the defendant from certain land alleged to be attached to the mosque and to have been unlawfully encroached upon, the Divisional Judge dismissed the plaintiff's suit holding that he was not competent to maintain it.

Held, that the suit would lie. Every Muhammadan who has a right to use a mosque is competent to maintain a suit against any one who interferes with the exercise of his such right to use : and by the same analogy every Muhammadan has a right to maintain a suit against persons who commit an injury upon property which has been devoted to the support of a mosque...

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" " *Custom*—*Succession to office of Mahant*—*Dharmasala Thakar Bhawal Singh, Amritsar*—*Nomination of successor*—*Approval of brotherhood.*—In a suit regarding the succession to the office of mahant of the *Dharmasala* of Nirmla Sadhs, known as Thakar Bhawal Singh, situate outside the city of Amritsar, *held*, that by custom the rule of succession was that the mahant may nominate his successor, but that nomination will not prevail unless the brotherhood formally approve the appointment.

If there be no nomination, then the brotherhood meet and formally appoint.

The references are to the Nos. given to the cases in the "Record."

No.

If the mahant misconducts himself, the brotherhood have the power to dismiss him.

The brotherhood strictly speaking are those connected by spiritual ties with the founder of the institution, although it apparently may be held to include also the whole sect who are also related to each other by spiritual ties.

Punjab Record, No. 37 of 1891, referred to... 105

Religious Institution.—*Muhammadan shrine, Dera Ismail Khan District—Succession to land and offerings—Alienations—Religious office.*—J. M., who died about a year before suit, was owner of half the land attached to the Shah Habibwala khangah in the Dera Ismail Khan District and was entitled to a half share in the management and offerings of the shrine : he settled this property on N. M., his sister's son, on condition that he (the grantor) should receive maintenance during his lifetime.

The plaintiffs, members of the family and related to J. M. in the fourth degree (computed in accordance with the opinion expressed in *Punjab Record*, No. 126 of 1890), were entitled to a two-thirds share of the other moiety of the management and offerings, sued to set aside the above arrangement on the grounds (1) that the property was *waqf*; and (2) that J. M. was not competent to make the alienation.

Held, that by custom the plaintiffs were entitled to inherit the share in the management and offerings in preference to N. M., a sister's son, his place being after collaterals related in the fourth degree.

Held, also, that assuming that J. M. as proprietor could alienate only for necessity, there appeared to be satisfactory reasons for holding that the alienation of the land was justified by necessity. The land was simply heritable property unconnected with the shrine, save that hitherto both had belonged to the same people.

Held, also, that the shrine must be regarded as a religious institution of a sort. It could not be regarded as *waqf*, it being nowhere laid down that a mausoleum raised to a saint is to be so treated. The succession to the superintendence and management of the shrine are to be determined by the rules and customs which have hitherto been applied to the particular institution, as in other like cases.

Held, further, that the transfer of a share in the shrine and the offerings was akin to the transfer of a religious office and was invalid. I. L. R. 6 Mad., 76, referred to and followed ... 106

Hindu Law—Joint family—Partial disruption—Presumption—Management of religious institution—Founder's rights.—The presumption in favour of a Hindu joint family remaining joint is no longer applicable when it is admitted that a disruption of the family has once taken place. *Punjab Record*, No. 143 of 1882, referred to and followed.

There is no authority for the proposition that the management of a Hindu religious or charitable institution is on the footing of a joint tenancy and that the succession goes to the survivor ... 140

Remand Order.—See Appeal, Duty of Appellate Court.

The references are to the Nos. given to the cases in the "Record."

- No.**
- Res Judicata.**—Section 13, Explanation II, Civil Procedure Code, 1882—*Matter which ought to have been made ground of defence in former suit.*—Section 13, Explanation II, Civil Procedure Code, 1882, which provides that any matter which might and ought to have been made ground of defence or attack in the former suit, shall be deemed to have been a matter directly and substantially in issue in such suit, does not further declare that such matter shall be deemed to have been heard and finally decided.
- The Explanation was not intended to enable a party to treat a point as having been decided in his favour in a former suit, which was in fact not so decided. It applies rather to a case where the defendant has a defence which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward the suit was decreed against him 124
- „ „ Civil Procedure Code, Section 13, Explanation II—*Ground of defence or attack in former suit—Parties litigating under the same title.*—The widow of one K. B. sued K. B.'s brother (G. H.) and daughter for her deceased husband's share of the estate for her life, and obtained a decree for half the property. While the above suit was pending, G. H. died, and the present plaintiff, who was K. B.'s son-in-law, was brought on the record (with others) as G. H.'s legal representative, but was not allowed by the Court to put forward any claim of his own as K. B.'s khanadamad in answer to the widow's claim. Subsequently, the said plaintiff sued the widow and daughter of K. B. for K. B.'s estate as his heir and khanadamad.
- Held*, that the suit was not barred as *res judicata* under Explanation II, Section 13, Civil Procedure Code, by reason of the previous decision, as the plaintiff was not litigating under the same title in the two suits, and moreover his title to succeed as K. B.'s khanadamad was properly rejected as a ground of defence in the previous litigation ... 142
- Resumption of Mauji.**—See Muafidar.
- Review of judgment.**—Civil Procedure Code, 1882, Section 629—*Review of review—Competency of.*—The language of the last paragraph of Section 629, Civil Procedure Code, 1882, that "No application to review an order passed on review or on an application for a review shall be entertained" forbids any application for review of an order admitting or rejecting an application for review, or of the judgment arrived at after a re-hearing of the case under Section 630, whether that judgment affirms or varies the previous judgment, and though, in either case it is followed by a new decree, in other words, a review of a review is not competent.
- The word "order" in the clause referred to is, apparently, not used in a technical sense as opposed to a "decree," but as a comprehensive term to express the final adjudication of the Court after the application for review has been admitted, and the case re-heard, and includes both the judgment and the decree 57
- Revision.**—*Material irregularity—Grounds for revision.*—It is a material irregularity and forms a ground for revision when the lower Courts act upon a misrepresentation of a fact apparent upon the record, or the erroneous assumption of a fact, or the application of a rule, or a failure to appreciate the true points for determination

The references are to the Nos. given to the cases in the "Record."

- raised by a general issue, such as one of *res judicata* or limitation, when such irregularity results in the dismissal of a suit on a technical ground, apart from the merits, which can be shown to be erroneous. *Punjab Record*, No. 105 of 1888, Nos. 42, 130 and 206 of 1889, Nos. 6 and 108 of 1890, and Nos. 60 and 65 of 1891, referred to ... 26
- Revision—Jurisdiction—Refusal of District Judge to issue a notice under Regulation XVII of 1806.** The District Judge refused to issue a notice under Regulation XVII of 1806, holding that the mortgage deed propounded was not a mortgage by conditional sale and therefore not within the scope of the Regulation.
- The plaintiff applied for revision.
- Held*, overruling the District Judge as to the nature and construction of the document, that his order was under the circumstances open to revision.
- I. L. R., 3 All., 576, referred to and followed. ... 119
- ” *” Civil Procedure Code, Section 622—Order under Section 108 of the Code, setting aside an ex parte decree—Revision.*—An application was made to revise an order made under Section 108, Civil Procedure Code, setting aside an *ex parte* decree, such order being made nearly seven years after the date of the decree.
- Held*, following *Punjab Record*, No. 114 of 1883, that no application under Section 622 of the Code would lie. The suit was one in which an appeal would lie, and by the word “case” the whole suit is meant 125
- Right to sue—Criminal Procedure Code, 1882, Sections 133 and 137—Public place—Right to sue for declaration of rights in Civil Court.**—Notwithstanding the words in Section 133, Criminal Procedure Code, 1882: “No order duly made by a Magistrate under this section shall be called in question in any Civil Court,” it is open to a person who claims to be the sole proprietor of land, with reference to which a Magistrate has made a conditional order under the said section treating it as a “public place,” which conditional order has, in due course of law, been made absolute under Section 137 of the Code, to sue the opposite party in the Civil Court for a declaration of his rights in such land.
- Punjab Record*, No. 94 of 1889, overruled ... 34
- ” *” Suit to contest alienation on ground of relationship—Failure to prove allegation—Enquiry as to plaintiff’s rights as ultimate heirs.*—The plaintiff sued on the allegation that they were collateral heirs of S. S. in the fifth degree. The lower Appellate Court while agreeing with the Court of first instance that the plaintiffs had failed to establish any definite relationship to S. S., remanded the suit for an inquiry as to whether plaintiffs were not entitled to sue as the ultimate heirs, being members of the same gôt as S. S. and therefore presumably descended from a common ancestor and also being proprietors in the same division of the village. Ultimately, it was decided that the plaintiffs could sue as being of the same gôt and patti as S. S.
- Held*, that the decree of the lower Appellate Court must be reversed. No distinct relationship to S. S. and no custom entitling them to sue upon the grounds set up on their behalf by the Appellate Court was established by the plaintiffs.
- Punjab Record*, No. 78 of 1886, referred to and distinguished ... 68

The references are to the Nos. given to the cases in the "Record."

No.

Right to sue.—*Indian Limitation Act, 1877, Schedule II, Articles 97 and 115—Suit to recover amount paid out of Court in execution of decree.*—The defendant, K. L., obtained a decree against plaintiff for Rs. 2,347 and employed the other defendant, K. R., to execute the decree as his agent under a formal power of attorney.

The plaintiff in the present suit alleged a payment of Rs. 900 in cash to the agent on 3rd February 1885.

On 2nd November 1887, execution of the decree was sued out without credit being given for the Rs. 900, and on 28th February 1888 K. L. denied the receipt of the money through his agent and declined to give credit for the amount.

On 22nd April 1889, the plaintiff (in the present suit) sued to recover the Rs. 900 alleged to have been paid.

Held, that the suit would lie and was governed either by Articles 97 or 115, Schedule II of the Indian Limitation Act, 1877, and was within time.

79

" **Habitual worshipper at mosque—Ejection of trespasser.**—In a suit by one who was a habitual worshipper at a certain Muhammadan mosque, of which he was also a neighbour and a supporter or well-wisher, for the ejection of the defendant from certain land alleged to be attached to the mosque and to have been unlawfully encroached upon, the Divisional Judge dismissed the plaintiff's suit holding that he was not competent to maintain it.

Held, that the suit would lie. Every Muhammadan who has a right to use a mosque is competent to maintain a suit against any one who interferes with the exercise of his such right to use: and by the same analogy every Muhammadan has a right to maintain a suit against persons who commit an injury upon property which has been devoted to the support of a mosque

87

S.

Sale of Houses by Menials.—*Custom—Village menials—Sale of their houses by, without consent of proprietors.*—*Found*, that in the village of Haria in the Bhera tahsil, Shahpur District, no custom was established permitting menials to sell their houses without the consent of the proprietary body

99

Shamilat.—See Common Land.

Small Cause.—*Suit for share of offerings received for a specified period.*—A suit for a certain share of offerings received at a shrine for a certain period, the plaintiffs claiming as rightful successors to the former incumbent, the defendants being, one, the Manager of the Golden Temple, who held the money in dispute in safe custody only, and the other defendant a rival claimant, who set up a title as donee, is a "small cause"

84

Specific Relief Act, 1877, Section 42—Declaratory decree—Plaintiff alleging title as well as possession, asking for declaration as to possession only—Judicial discretion.—The plaintiffs sued, alleging that they were owners and in possession of certain land; that two deeds of sale were executed by them in 1877 and 1879, purporting to convey portions of the said land to the defendant; that the defendant never got possession under the said deeds, as the full consideration.

The references are to the Nos. given to the cases in the "Record."

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money was never paid by him ; that notwithstanding this fact, the defendant had succeeded in obtaining *dakhil kharij* from the Revenue authorities, which was calculated to cause injury to the plaintiffs, though it had not ousted them from actual possession ; and the plaintiffs, therefore, prayed for a declaratory decree *that they were in possession of the entire land*, and that the mutation in the defendant's favour would not affect their rights of possession. The plaint was silent on the question as to with whom the ownership of the property legally rested.

Held, that the suit as laid had been rightly dismissed. Assuming it to be correct, that a plaintiff who alleges title as well as possession cannot be allowed to ask for a declaration as to his possession only, there being a further dispute between parties as to the title, the suit would not lie.

But in any case, the proper decree for a Court to make upon a claim framed in the above manner, and leaving open the question of title, would be one declining to exercise its judicial discretion by making any such declaration, the effect of which would be to leave the real matter of dispute between the parties undealt with and undisposed of

48

Statutory Authority of Municipal Committee.—See Municipal Committee.

Striking out Defence.—See Civil Procedure Code.

Suits Valuation Act, 1887.—*Suit by mortgagee for possession*—*Suits Valuation Act, 1887*—*Value for purposes of jurisdiction.*—A suit by a mortgagee seeking to recover possession of land under his mortgage is a suit falling within the rules made under the Suits Valuation Act, 1887, which provide that in suits for possession of land under clause 5, Section 7, Court Fees Act, 1870, the value of the suit for purposes of jurisdiction is thirty times the land-revenue.

The ruling in *Punjab Record, No. 1 of 1887*, that in a suit by a mortgagee for possession, the subject matter was not the land itself but the mortgagee's interest therein under the mortgage, must be deemed to be superseded by the passing of the Suits Valuation Act and the rules made thereunder

56

Rules under—Suit to declare an alienation of land to be not binding after grantor's death—*Further appeal*—*Value of suit Rs. 1,000 or upwards*—*Punjab Courts Act, 1884, Section 40.*—The plaintiffs sued for a declaratory decree that an alienation by a childless proprietor would not affect their reversionary interests in the land, the subject of the alienation : the grantor was alive and no consequential relief was prayed for.

The alienation challenged by the plaintiffs purported to be for Rs. 1,300: the value of the land calculated at 30 times the revenue was Rs. 770.

Held, that no further appeal to the Chief Court was competent in the absence of an application to the Divisional Judge for a Certificate under Section 40, sub-section (1) (d), Punjab Courts Act, 1884, the value of the suit for purposes of jurisdiction being less than Rs. 1,000, and both Courts having concurred in decreeing the claim.

The references are to the Nos. given to the cases in the "Record."

The suit as brought, though it fell within the description of claim mentioned in No. 11 of the Rules issued under Part II of the Suits Valuation Act, was subject to the proviso to that Rule, and as the subject of the alienation impugned was land as specified in Section 3 of the Act, and was valued for purposes of jurisdiction at 30 times the revenue, or Rs. 770, according to the Rules made under that Section, it followed from Section 4 of the same Act that the value of the present claim could not be held to be in excess of that sum.

Held, also, that the lower Appellate Court's decree could not be said to involve *directly* some claim to, or question respecting, property of Rs. 1,000 or upwards in value within the meaning of Section 40, sub-section (1) (a) of the Courts Act 145

Survivorship.—See Religious Institution.

T.

Tenancy Act, 1887.—*Unauthorised alienation by occupancy tenant—Tenant's right to recover possession from landlord.*—When an occupancy tenant has made an unauthorised alienation of his holding including the giving of possession to the alienee, and the landlord has sued successfully to have the alienation declared void and to recover possession from the alienee, it is not a good answer to a suit by the alienor against the landlord to obtain re-entry on his holding, that the plaintiff is not able to show that he is no longer bound by the contract, either because the alienee has taken back his money, or because the contract has been put an end to in some other way.

Punjab Record, No. 74 of 1884, decided with reference to the provisions of the Tenancy Act, 1868, not followed 17

" „ *Civil and Revenue Courts—Site of water-mill—Purpose subservient to agriculture—Jurisdiction.*—The plaintiff sued for damages for the unlawful possession of a water-mill.

Held, that the suit was cognizable by the Civil and not by the Revenue Courts, the purpose for which the site of the mill was occupied, viz., the grinding of corn not being a purpose "subservient to agriculture" within the meaning of Section 4 (1), *Punjab Tenancy Act, 1887* 41

" „ *Pre-emption—Transferable rights of occupancy—Section 10, Punjab Laws Act—Right created by Statute or Contract.*—The provision of Section 10, *Punjab Laws Act, 1872* (as amended), that the right of pre-emption shall *prima facie* be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands, applies not only to sales by *occupancy tenants*, but is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration.

A right of occupancy may be transferable within the meaning of Section 10, *Punjab Laws Act*, either because a power to transfer is given by the *Tenancy Act*, or because there is an agreement between the landlord and tenant excluding the operation of such of the provisions of the Act as would otherwise prevent alienation. In the present case, the right of occupancy being created by contract would,

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ordinarily, and in the absence of express agreement, be non-transferable; but in conferring the right, the landlord had expressly granted full power of alienation and had thus created or sold a transferable right	43
Tenancy Act, 1887—Jurisdiction of Civil Court—Mortgage by occupancy tenant—Mortgagee to receive half net profits without possession—Punjab Tenancy Act, 1887, Section 77 (k). —The defendant, a tenant with rights of occupancy, mortgaged his land to the plaintiff on the understanding that the mortgagor should retain possession and the mortgagee receive half the net profits of the tenancy.	
The defendant withheld from the plaintiff his share of the profits; hence the present suit.	
Held, that the suit was cognizable by the Civil Court, the plaintiff and defendant not being co-sharers "in an estate or holding," and clause (k), sub-section (3), Section 77, Punjab Tenancy Act, 1887, being therefore inapplicable	70
Tort.—See Damages.	
Joint owners—Erection of building by one on common land—Absence of special damage to others. —The defendant, who was a proprietor in Gohana (Rohtak District), erected a pakka building upon a portion of the abadi—208 yards in extent—or common property of the village. The building was commenced within a very few months before suit, and was immediately objected to by at least one of the plaintiffs. It was completed in spite of the plaintiffs' protests and appeal to the Revenue authorities, at or about the date when the present suit was launched. The defendant spent Rs. 1,000 or thereabouts upon the building, which was adjacent to if not built on to, his own house. No acquiescence on the plaintiffs' part was established.	
The plaintiffs, sixteen proprietors of Gohana, sued to have the building demolished. They did not succeed in proving any substantial damage from the building over and above the fact that defendant had probably monopolized a larger share of this particular portion of the common land than would fall to him at a division.	
Held, that the plaintiffs' appeal must be dismissed upon the ground that, it not being satisfactorily established that any substantial mischief had accrued to the plaintiffs from the completed building erected at considerable expense, the lower Court had exercised a wise discretion in refusing to order its demolition	54
U.	
Udasi faqir.—Abandonment of worldly affairs—Loss of rights of inheritance. —By Hindu law, if a man become an Udasi faqir, he abandons worldly affairs and loses his civil rights of inheritance in his natural family. But it is yet possible that a man may resolve to become a faqir of the Udasi sect and yet resolve not to abandon worldly affairs and his civil rights of inheritance, the effect that such a course might have upon his status as a faqir, in the eyes of other Udasi faqirs, not being material.	
The true issue in such cases is, did the man on becoming a faqir also intend to renounce and did he renounce the world, the burden of proof that he did not being upon him	7

The references are to the Nos. given to the cases in the "Record."

No.

Unregistered Association.—*Personal liability of Secretary of Managing Committee, who was also a Member thereof and a depositor in the Association.*—B. guaranteed the honesty of his brother who was appointed Manager of the Sind, Punjab and Delhi Railway Co-operative Stores, which was an unregistered private Association of the nature of a Club. B. further deposited Rs. 3,000 under the guarantee.

In a suit by B. against S., who was, at the time of the contract, a depositor in the Association, a Member of the Managing Committee and also its Secretary, for a refund of portion of his guarantee deposit, held, that S. was personally liable, either as a sole promisor, or as a joint promisor (Section 43, Contract Act), and that a suit against him would lie 11

V.

Value of suit.—*See Court Fees Act, 1870.*

See Punjab Courts Act, 1884.

See Suits Valuation Act, 1887.

Village Menials.—*Custom—Sale of their houses by, without consent of proprietors.*—*Found,* that in the village of Haria in the Bhera tahsil, Shahpur District, no custom was established permitting menials to sell their houses without the consent of the proprietary body 99

W.

Waiver.—*Jurisdiction—Small Cause Court—Withdrawal of suit pending in, and determined by District Judge—Objection as to jurisdiction.*—In a suit heard and determined by a competent Court, the parties having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial proceedings, which if objected to at the time, would have led to the dismissal of the suit.

Ledgard v. Bull, I. L. R., 9 All., 191, (Privy Council Case) referred to and followed 118

Wajib-ul-ars.—*Custom—Evidence—Modification of custom.*—The parts of a *Wajib-ul-ars* referring to custom are not provisions intended to be in force for a limited period only,—they are statements that a certain custom exists. The statement may or may not be correct, but if it is correct, there would be a natural presumption that the custom continued to exist, and it would be for those alleging that a change had subsequently taken place to prove the allegation.

The production of a later Record of Rights containing entries opposed to the earlier one would no doubt be some proof of such a change, but there would then merely be a balance of evidence on either side: it could not be said that the second Record destroyed or abrogated the earlier one.

Punjab Record, No. 107 of 1887, referred to 8

Water.—*Right to use of water. See Land Suit.*

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<i>Held, that the suit was cognizable by the Civil and not by the Revenue Courts, the purpose for which the site of the mill was occupied, viz., the grinding of corn, not being a purpose "subservient to agriculture" within the meaning of Section 4, (1), Punjab Tenancy Act, 1887</i>	41
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TO

CRIMINAL JUDGMENTS,

1892.

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A.

Act X of 1882.—See Criminal Procedure Code.

C.

Criminal Procedure Code, 1882.—Punjab Municipal Act, 1891, Section 186—Authority for prosecutions under the Act—Complaint.—Section 186, Punjab Municipal Act, 1891, provides that—

No Court shall take cognizance of any offence punishable under this Act or any rule or bye-law except on the complaint of the Committee or of some person authorized by the Committee in this behalf.

A document was addressed to the Deputy Commissioner, Rohtak, by the Municipal Committee of Bahadargarh, requesting that, in accordance with the Committee's proceedings of 2nd May 1892, a second prosecution might be instituted against Abdul Aziz under Section 169 of the Municipal Act, 1891.

The Deputy Commissioner by an order, dated 23rd May 1892, ordered that "a case be instituted and be made over to the Tahsildár of Sampla."

Held, with reference to the provisions of Sections 4 (a) and 191, Criminal Procedure Code, that no "complaint" had been made of which the Magistrate could take cognizance 1

" " " *Punjab Municipal Act, 1891, Section 186—Authority for prosecution—Complaint.—The Secretary, Municipal Committee, Peshawar, wrote an informal letter to a second class Magistrate making certain suggestions as to proceedings against the accused under the Municipal Act, 1891, and the verbal authorization of the Deputy Commissioner (who was also apparently President of the Committee) was afterwards relied on.*

The Secretary of the Committee was not examined on oath with reference to the contents of his letter.

Held, that there was no complaint by the Municipal Committee or by some person authorized by the Committee in that behalf, of which a competent Magistrate could take cognizance, Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code ... 2

The references are to the Nos. given to the cases in the "Record."

No.

Criminal Procedure Code, 1882.—Punjab Municipal Act, 1891, Section 186—Authority for prosecution—Complaint.—A complaint was filed entitled as follows :—" The Municipal Committee, through Mr. Webb, Inspector of Sanitation, complainant," against Nur Din.

At the foot was written in Urdu " Petition of Mr. Webb, Inspector of Sanitation, Civil Station, Lahore " : below this was an English signature " D. Johnston " which appeared to be the signature of the Secretary of the Committee.

Held, that this was not a complaint made in accordance with law (Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code) and that the Magistrate's proceedings must be set aside 3

" " " **Criminal Procedure Code, Section 540—Power to summon material witness.**—Section 540, Criminal Procedure Code, does not authorize a Sessions Judge to summon witnesses after the trial has been concluded, so far that no witnesses remain to be examined for either side and the assessors have given their opinion ... 4

" " " **Criminal Procedure Code, Section 110—Security for good behaviour from habitual offenders.**—The District Magistrate found that the accused was a bad character and earning his living through prostituting one of his wives.

Held, that this was not a ground for demanding security from the accused under Section 110, Criminal Procedure Code.

The law enabling security to be taken from a person who is proved to be by common report a habitual thief is no doubt a salutary law, but it is a hard law that can be used for oppressive purposes, unless the Magistrates who are called upon to apply it exercise their judicial discretion in a judicious manner 5

" " " **Criminal Procedure Code, Section 195—Sanction to prosecute for false charge of offence and giving false evidence.**—M. R. made a charge against M. K. and others of a violent assault upon him and others. The charge was investigated by a Magistrate and M. K. was discharged.

The Magistrate and Sessions Judge refused sanction under Section 195, Criminal Procedure Code, to M. K. to file a complaint against M. R. under Section 211, Indian Penal Code.

Held, under the particular circumstances that this was a fit case in which sanction should be given 11

" " " **Criminal Procedure Code, Section 110—Security for good behaviour from habitual offenders—Evidence.**—Although specific offences need not be proved to have been committed by the person against whom an order is made under Section 112, Criminal Procedure Code, it is nevertheless necessary that there should at least be evidence of general repute that he is a habitual offender of the classes described in Section 110.

It is easy to use Section 110 for purposes of oppression if Magistrates are not careful to require clear proof against the accused ... 12

The references are to the Nos. given to the cases in the "Record."

No.

H.

Hackney Carriage Act, 1879, Sections 6 and 7—Driving an unlicensed carriage.—

To drive an unlicensed carriage is not a breach of Rule I of the Rules made for the Umballa Cantonment under the Hackney Carriage Act, 1879, so as to be punishable under Section 7 ...

7

M.

Municipal Committee.—Punjab Municipal Act, 1891, Section 186—Authority for prosecutions under the Act—Criminal Procedure Code—Complaint.—Section 186, Punjab Municipal Act, 1891, provides that—

No Court shall take cognizance of any offence punishable under this Act or any rule or bye-law except on the complaint of the Committee or of some person authorized by the Committee in this behalf.

A document was addressed to the Deputy Commissioner, Rohtak, by the Municipal Committee of Bahadargarh requesting that, in accordance with the Committee's proceedings of 2nd May 1892, a second prosecution might be instituted against Abdul Aziz under Section 169 of the Municipal Act, 1891.

The Deputy Commissioner by an order, dated 23rd May 1892, ordered that "a case be instituted and be made over to the Tahsildar of Sampla."

Held, with reference to the provisions of Sections 4 (a) and 191, Criminal Procedure Code, that no "complaint" had been made of which the Magistrate could take cognizance ...

1

Punjab Municipal Act, 1891, Section 186—Authority for prosecution—Criminal Procedure Code—Complaint.—The Secretary, Municipal Committee, Peshawar, wrote an informal letter to a second class Magistrate making certain suggestions as to proceedings against the accused under the Municipal Act, 1891, and the verbal authorization of the Deputy Commissioner (who was also apparently President of the Committee) was afterwards relied on.

The Secretary of the Committee was not examined on oath with reference to the contents of his letter.

Held, that there was no complaint by the Municipal Committee or by some person authorized by the Committee in that behalf of which a competent Magistrate could take cognizance—Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code.

2

Punjab Municipal Act, 1891, Section 186—Authority for prosecution—Complaint—Criminal Procedure Code.—A complaint was filed entitled as follows:—

"The Municipal Committee, through Mr. Webb, Inspector of Sanitation, complainant" against Nur Din.

At the foot was written in Urdu "petition of Mr. Webb, Inspector of Sanitation, Civil Station, Lahore": below this was an English signature "D. Johnston" which appeared to be the signature of the Secretary of the Committee.

The references are to the Nos. given to the cases in the "Record."

No.

Held, that this was not a complaint made in accordance with law (Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code) and that the Magistrate's proceedings must be set aside 3

P.

Penal Code.—Indian Penal Code, Sections 447, 509—Criminal trespass—Intrusion on privacy, intending to insult modesty of a woman.—To constitute intrusion upon the privacy of a woman an offence under Section 509, Indian Penal Code, the intruder must be intending to insult the modesty of such woman. The opening words of the section relate to and qualify each one of the acts subsequently mentioned in it as constituting an element in the offence there defined.

The facts found by the Magistrate were that the accused was on prosecutor's premises with intent to peep or endeavour to peep into the apartments occupied by the ladies of the household.

Quære.—Whether these findings justified a conviction of the offence of intruding upon the privacy of a woman, whereby to insult her modesty.

Found, on the evidence, that it was not proved that the accused was on the premises with any intent that constituted his presence there criminal trespass 6

" " *Indian Penal Code, Sections 149, 304 and 325—Unlawful assembly—Culpable homicide not amounting to murder—Voluntarily causing grievous hurt—New trial.*—The accused eight in number and armed with lathis beat, first, M. A., then N. A. who came to his aid, and then A., who died of the injuries he received, his skull being extensively fractured.

The case was tried by a first class Magistrate who convicted and sentenced the accused as follows :—

G. under Section 149, Indian Penal Code: one year's rigorous imprisonment and Rs. 20 fine.

The other accused under Section 148, Indian Penal Code, four months' imprisonment and Rs. 10 fine.

Held, that the convictions and sentences must be set aside and the District Magistrate be directed to inquire into and try the case on charges as follows :—

G. on charges under Section 304 and Section 325, Indian Penal Code and all the other accused under Sections 148 and 149, Indian Penal Code, in respect of the injury to and death of A.

All the accused on charges under Section 148 and Section 149, Indian Penal Code, as regards the injuries to M. A. and N. A. 8

" " *Indian Penal Code, Sections 235 and 240—Possession of instrument for purpose of using the same for counterfeiting coin—Delivery of Queen's coin, with knowledge that it is counterfeit.*—The accused went into a village and purchased sweetmeats from one K. for which he paid with a counterfeit two-anna bit: he also delivered another counterfeit two-anna bit to R. in payment for some milk. K., on discovering the fraud, pursued the accused, and, aided by two others, arrested him. On being pursued the accused threw away a yellow bag which was

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found to contain a mould, an instrument called a "gugi" used for keeping up a draught in a fire, a file and some white metal, all evidently instruments or materials used for counterfeiting coin.	
<i>Held</i> , upon these facts, that the conviction should have been under Section 235, Indian Penal Code, and not under Section 240, the latter section not applying to the actual coiner, and there being nothing to show under what circumstances the accused became possessed of the counterfeits of the Queen's coin	10

R.

Railways Act, 1890.—Section 101—Endangering safety of persons—Gateman asleep—Engine driver omitting to stop train—Sanction.—The Magistrate found that the accused, a gateman, was asleep on duty and did not open his gates when a train was coming: that the accused was therefore negligent on duty and the safety of human beings was thereby put in danger: and the Magistrate held that the accused was not free from responsibility because the engine driver also neglected to stop his train before reaching the gates.

Held, that the conviction was right under Section 101, Indian Railways Act, 1890.

Held, also, that no sanction is necessary to the institution of a complaint of an offence punishable under Section 101 9

S.

Security for good Behaviour.—See Criminal Procedure Code.

LETTER OF INVITATION

TO THE MEMBERS OF THE ASSOCIATION OF AMERICAN STATES

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Act XIV of 1882.—See Civil Procedure Code.

Act XVI of 1887.—See Tenancy Act.

Act XVII of 1887.—See Land Revenue Act.

Appeal—*Duty of Appellate Court.*—*Appeal dismissed for default*—*Notice to appellant of time and place for hearing.*—In the matter of fixing dates and places for hearing suits and appeals, Revenue Courts are bound by the same rules as Civil Courts.

Held, therefore, that where the Collector disposed of an appeal in camp, no notice of the place for hearing being given by him—an application under Section 558, Civil Procedure Code, to restore the appeal being rejected by the Collector, which order was upheld by the Commissioner on appeal—the proceedings of both the lower Appellate Courts must be set aside with a direction to the Collector to re-hear the appeal, after fixing a date and place for this purpose and giving notice thereof to the parties.

Punjab Record, No. 48 of 1875, Civil; *Judicial Circular XIII*, para. 11 (page 50, 3rd edition); and *Revenue Circular No. 17*, para. 23 (Vol. I, page 71), referred to

7

Atrafi.—See Village Dues.

C.

Civil Procedure Code (Act XIV of 1882).—*Appeal*—*Non-appearance of appellant*—*Dismissal for default.*—If on the day fixed in that behalf for the hearing of an appeal, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default (Section 551, Civil Procedure Code, and Section 88, Punjab Tenancy Act, 1887)

4

" " " " " *Occupancy tenants*—*Status*—*Res judicata.*—In a suit for enhancement of rent, the Settlement Collector declared the tenants to come under Section 6 of the Tenancy Act, 1887, and enhanced their rent accordingly. The tenants had not expressly claimed any particular status and the question of their status was not expressly put in issue.

Held, in a subsequent suit by the tenants to establish a right of occupancy under Section 5, sub-section (1) (a) of the Tenancy Act, that the lower Courts had rightly held that the question of status had already been decided.

The references are to the Nos. given to the cases in the "Record."

- No.**
- The tenants should have raised the point in their answer to the first suit: this they omitted to do, and the provisions of Section 13, Explanation II, operated to make the question *res judicata* 5
- Civil Procedure Code (Act XIV of 1882).**—*Appeal dismissed for default—Notice to appellant of time and place for hearing.*—In the matter of fixing dates and places for hearing suits and appeals, Revenue Courts are bound by the same rules as Civil Courts.
- Held*, therefore, that where the Collector disposed of an appeal in camp, no notice of the place for hearing being given by him—an application under Section 558, Civil Procedure Code, to restore the appeal being rejected by the Collector, which order was upheld by the Commissioner on appeal—the proceedings of both the lower Appellate Courts must be set aside with a direction to the Collector to re-hear the appeal, after fixing a date and place for this purpose and giving notice thereof to the parties.
- Punjab Record*, No. 48 of 1875, Civil; *Judicial Circular XIII*, para. 11 (page 50, 3rd edition); and *Revenue Circular* No. 17, para. 23 (Vol. I, page 71), referred to 7
- " " " (Act XIV of 1892).—*Section 551—Dismissal of appeal for default—Fixing day for hearing appellant or his pleader.*—The defendant filed an appeal in the Commissioner's Court. The practice of the Court was to permit appellants to deposit their appeals in a box.
- The appellant's appeal was taken up several days after being so deposited, but the appellant to whom notice had not been given, not appearing, it was dismissed in default.
- Held*, that as required by Section 551, Civil Procedure Code, the Commissioner should have fixed a day for hearing the appellant or his pleader, and that the appeal must be remanded to him for re-hearing. 19
- Common Land.**—*Partition—Shamilat taraf and shamilat deh—Ala lambardar—Muafi land held by ala lambardar in which he had no proprietary right.*—In a claim to partition certain shamilat taraf and shamilat deh land, it was sought to exclude the muafi land, which was shamilat taraf, held by the ala lambardar by virtue of his office and in which he had no proprietary right.
- Held*, that there was no reason for excluding this land from partition. This land was entered in the revenue records as common land of certain tarafs of the village and the records contained nothing which precluded the holding from being brought into partition ... 15
- J.**
- Jagirdar.**—*Punjab Land Revenue Act, 1887, Section 48, sub-section (2)—Collection of land revenue in cash or in kind—Right of Jagirdar when, and when not, an owner in the estate.*—The Punjab Land Revenue Act, XVII of 1887, contains a provision, viz., Section 48, sub-section (2), which did not form part of the old Revenue Law (Act XXXIII of 1871), to the effect that "land revenue may be assessed in cash or in kind, or partly "in cash and partly in kind, as the Local Government may direct."

The references are to the Nos. given to the cases in the "Record."

No.

According to the instructions issued by the Local Government (*cf. Punjab Record*, No. 2 of 1889, Rev.), a Settlement Officer is bound to assess every estate to a cash assessment, even when held in jagir, and to offer such settlement to the owners.

The only consideration which justifies the making of a settlement with a jagirdar is the fact of his being in some sense owner of the lands. The laxity which prevailed in the early days of Punjab administration in this respect is no longer permissible under the existing Revenue Law, which provides that every estate is to be assessed and the settlement offered to the owners.

If the estate is held in jagir by a jagirdar who is not the owner, he is only entitled to the Government demand. If he has any rights of ownership, these rights are not affected by a re-assessment of the revenue, and under Section 61 of the Land Revenue Act, 1887, the settlement may (subject to Rule 208) be offered to him.

Collections of the Government revenue in kind are no longer permitted, but a jagirdar who is also proprietor, and who as jagirdar has permission (Rule 226) to collect the revenue assigned to him, may without impropriety be permitted to continue collections in kind, where these have been customary.

A jagirdar who is not owner, even if permitted to collect his revenue, must collect it from the headman empowered to collect it from the landowners (Rule 226) if such revenue is payable in cash.

Found, also, upon the evidence, that the respondent (the jagirdar) had not established any title to be considered the owner of the estate

14

L.

Lambardar — Removal of from office when required by the Criminal Courts to give security for good behaviour—Duty of Collector.—Lehna Singh, a lambardar in the Sialkot District of sixteen years standing, was required by a competent Magistrate to give security for good behaviour for one year in a bond for Rs. 500. The Magistrate recorded evidence and held that Lehna Singh was the abettor of thieves and habitually received stolen property: he accordingly made an order against Lehna Singh under Sections 110 and 118, Criminal Procedure Code.

Lehna Singh appealed to the District Magistrate, who dismissed the appeal.

Upon the same day, the Collector of the District took up the case on the Revenue side to consider whether Lehna Singh was a fit person to retain the office of lambardar: the Collector dismissed him on the ground that it had been proved that he was a habitual receiver of stolen property and had been called upon to furnish security for one year.

Lehna Singh then appealed to the Commissioner, who reversed the Collector's order and directed that Lehna Singh be restored to his office on the ground that he had been "mechanically dismissed by the Collector, because the man had been put on security under Section "110, Criminal Procedure Code, by a Magistrate."

The references are to the Nos. given to the cases in the "Record."

No.

Held, by the Financial Commissioner, that when a lambardar has been ordered by a Magistrate to give security for good behaviour under the provisions of the Criminal Procedure Code and has failed, as Lehna Singh had failed, to get the order set aside either by the District Magistrate on appeal or by the Chief Court in revision, the lambardar is *prima facie* liable to dismissal from his office.

This, however, is not to be taken to mean that the Revenue authorities have no option in the matter and are absolutely bound to pass an order of dismissal; but those authorities would ordinarily fail in their duty if they retained such a lambardar in office unless he could show very strong reason why he should not be removed.

Ordinarily, such an order of dismissal should not be made immediately after the rejection of an appeal by the District magistrate refusing to set aside an order requiring security: a lambardar should first be suspended and the question of his dismissal or otherwise postponed until after the lapse of a reasonable time—say six months—to enable him to contest the order requiring him to give security ...

8

Lambardar.—Claim to office of—Adopted son, being also a sister's son.—The adopted son, who was also a sister's son of the deceased lambardar, claimed to succeed to the vacant office.

The Financial Commissioner, after a remand for inquiry on the question of custom, declined to interfere with the order of the Commissioner in which that officer refused to appoint, as lambardar, the adopted son, such adopted son being the sister's son of the deceased and belonging to a different got.

Punjab Record, No. 14 of 1886, Rev., referred to ...

9

Claim to office of—Adopted son, being also a daughter's son.—The adopted son, who was also a daughter's son, of the deceased lambardar, claimed to succeed to the vacant office.

The Financial Commissioner, after a remand for inquiry on the question of custom, declined to interfere with the order of the Commissioner in which that officer refused to appoint, as lambardar, the adopted son, such adopted son being the daughter's son of the deceased and belonging to a different got.

Punjab Record, No. 9 of 1892, Rev., referred to ...

10

Claim to office of—Adopted son, being also a sister's son.—The adopted son, who was also a sister's son of the deceased lambardar, claimed to succeed to the vacant office.

The Financial Commissioner declined to interfere with the order of the Commissioner setting aside the appointment of the adopted son, such adopted son being the sister's son of the deceased and belonging to a different got.

Punjab Record, Nos. 9 and 10 of 1892, Rev., followed ...

11

Claim to office of—Adopted son, being also a brother's son.—The adopted son, who was also a brother's son of the deceased lambardar, claimed to succeed to the vacant office in preference to the son of an elder brother of deceased.

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Lambardur .— <i>Claim to office of—Adopted son, being also a brother's son.</i> —The adopted son, who was also a brother's son of the deceased lambardar, claimed to succeed to the vacant office	
The Collector and Commissioner appointed the deceased's brother in preference to the adopted son.	
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Land Revenue Act , 1887, Section 48, sub-section (2)— <i>Collection of land revenue in cash or in kind—Right of jagirdar when, and when not, an owner in the estate.</i> —The Punjab Land Revenue Act, XVII of 1887, contains a provision, viz., Section 48, sub-section (2), which did not form part of the old Revenue Law (Act XXXIII of 1871), to the effect that "land revenue may be assessed in cash or in kind, or partly in cash and partly in kind, as the Local Government may direct."	
According to the instructions issued by the Local Government (<i>cf. Punjab Record</i> , No. 2 of 1889, Rev.) a Settlement Officer is bound to assess every estate to a cash assessment, even when held in jagir, and to offer such settlement to the owners.	
The only consideration which justifies the making of a settlement with a jagirdar is the fact of his being in some sense owner of the lands. The laxity which prevailed in the early days of Punjab administration in this respect is no longer permissible under the existing Revenue Law, which provides that every estate is to be assessed and the settlement offered to the owners.	
If the estate is held in jagir by a jagirdar who is not the owner, he is only entitled to the Government demand. If he has any rights of ownership, these rights are not affected by a re-assessment of the revenue, and under Section 61 of the Land Revenue Act, 1887, the settlement may (subject to Rule 208) be offered to him.	
Collections of the Government revenue in kind are no longer permitted, but a jagirdar who is also proprietor, and who as jagirdar has permission (Rule 226) to collect the revenue assigned to him, may without impropriety be permitted to continue collections in kind, where these have been customary.	
A jagirdar who is not owner, even if permitted to collect his revenue, must collect it from the headman empowered to collect it from the landowners (Rule 226) if such revenue is payable in cash.	
Found , also, upon the evidence, that the respondent (the jagirdar) had not established any title to be considered the owner of the estate.	14
O.	
Occupancy tenant .— <i>Punjab Tenancy Act</i> , 1887, Section 5, sub-section (1) (a)— <i>Occupancy rights—Jagirdar under grant from Sikh Government.</i> — Held , that the holder of a jagir granted in A. D. 1809 by an officer of the	

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Sikh Government on behalf of that Government and resumed by the British Government at annexation was a "jagirdar" within the meaning of Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887, which confers, under the circumstances specified therein, rights of occupancy on persons who have been jagirdars of the lands occupied by them ...

2

Occupancy tenant.—*Status*—*Res judicata*.—In a suit for enhancement of rent, the Settlement Collector declared the tenants to come under Section 6 of the Tenancy Act, 1887, and enhanced their rent accordingly. The tenants had not expressly claimed any particular status, and the question of their status was not expressly put in issue.

Held, in a subsequent suit by the tenants to establish a right of occupancy under Section 5, sub-section (1) (a) of the Tenancy Act, that the lower Courts had rightly held that the question of status had already been decided.

The tenants should have raised the point in their answer to the first suit: this they omitted to do, and the provisions of Section 13, Explanation II, operated to make the question *res judicata* ...

5

P.

Partition.—*Shamilat taraf and shamilat deh*—*Ala lambardar*—*Muafi land held by ala lambardar in which he had no proprietary right*.—In a claim to partition certain shamilat taraf and shamilat deh land, it was sought to exclude the muafi land, which was shamilat taraf, held by the ala lambardar by virtue of his office and in which he had no proprietary right.

Held, that there was no reason for excluding this land from partition. This land was entered in the Revenue records as common land of certain tarafs of the village and the records contained nothing which precluded the holding from being brought into partition...

15

Pleadings.—*Plaint*—*Secundum allegata*—*Decree of occupancy rights on basis other than that sued for*—*Material irregularity*.—The plaintiff sued for occupancy rights under Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887: the Commissioner being of opinion that the plaintiff had rights of occupancy under sub-section (1) (a) decreed accordingly, considering it unnecessary to determine whether the plaintiff was entitled to succeed upon the grounds alleged by him in his plaint.

Held, by the Financial Commissioner on revision, that it was a material irregularity on the part of the Commissioner to award the plaintiff a higher status than that asked for. The plaintiff had made no claim under Section 5, sub-section (1) (a), or amended his plaint asking for such relief, or in any way advanced a claim to be of a higher status than that prescribed in sub-section (1) (d) ...

1

R.

Revision.—*Plaint*—*Secundum allegata*—*Decree of occupancy rights on basis other than that sued for*—*Material irregularity*.—The plaintiff sued for occupancy rights under Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887: the Commissioner being of opinion that the plaintiff had

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a right of occupancy under sub-section (1) (a) decreed accordingly, considering it unnecessary to determine whether the plaintiff was entitled to succeed upon the grounds alleged by him in his plaint.

Held, by the Financial Commissioner on revision, that it was a material irregularity on the part of the Commissioner to award the plaintiff a higher status than that asked for. The plaintiff had made no claim under Section 5, sub-section (1) (a), or amended his plaint asking for such relief, or in any way advanced a claim to be of a higher status than that described in sub-section (1) (d) ... 1

Revision.—Ejectment—Omission to direct tenant to file a statement of claim to compensation—Material irregularity.—It is a material irregularity if a Court of first instance omits, in a suit to contest a notice of ejectment, to call upon the tenant to file a statement of his claim, if any, to compensation for improvements or for disturbance, and of the grounds thereof, in pursuance of the directions contained in Section 70, Punjab Tenancy Act, 1887.

Punjab Record, No. 13 of 1890, Rev., referred to ... 6

" *Material irregularity—Omission to consider provisions of the Tenancy Act, 1887, as affecting claim to occupancy rights.*—A lower Court acts with material irregularity in disposing of a plaintiff's claim to occupancy rights without reference to the new Tenancy Act, XVI of 1887.

In the Settlement Record of 1882, a Record compiled when the old Tenancy Act (XXVIII of 1868) was in force, the plaintiffs were apparently rightly recorded as being tenants-at-will, because they were not in 1868 the representatives of persons who had settled in the village with the founders (Section 5 (3), Act XXVIII of 1868).

Since 1882, however, the new Tenancy Act has been passed, Section 5, sub-section (1) (c) of which is much wider than Section 5 (3) of the old Act.

The case remanded to the Commissioner for redécision accordingly... 16

" *Material irregularity—Granting decrees for occupancy rights under Section 8, Punjab Tenancy Act, 1887, on vague and ill-considered grounds.*—

The lower Courts decreed the plaintiff's rights of occupancy under Section 8, Tenancy Act, 1887, on vague grounds and without considering the test laid down in *Punjab Record*, No. 4 of 1875, Rev.

Held, that this amounted to a material irregularity justifying the remanding of the case to the first Court for redécision, after further inquiry if necessary ... 17

T.

Tenancy Act, 1887.—Plaint.—Secundum allegata—Decree of occupancy rights on basis other than that sued for—Material irregularity.—The plaintiff sued for occupancy rights under Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887: the Commissioner being of opinion that the plaintiff had rights of occupancy under sub-section (1) (a), decreed accordingly, considering it unnecessary to determine whether the plaintiff was entitled to succeed upon the grounds alleged by him in his plaint.

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" " <i>Appeal—Non-appearance of appellant—Dismissal for default.—If</i> on the day fixed in that behalf for the hearing of an appeal, the appellant does not attend in person or by his pleader, the appeal <i>shall</i> be dismissed for default (Section 551, Civil Procedure Code, and Section 88, Punjab Tenancy Act, 1887)	4
" " <i>Occupancy tenants—Status—Res judicata.—In</i> a suit for enhancement of rent the Settlement Collector declared the tenants to come under Section 6 of the Tenancy Act, 1887, and enhanced their rent accordingly. The tenants had not expressly claimed any particular status and the question of their status was not expressly put in issue.	
<i>Held</i> , in a subsequent suit by the tenants to establish a right of occupancy under Section 5, sub-section (1) (a) of the Tenancy Act, that the lower Courts had rightly held that the question of status had already been decided.	
The tenants should have raised the point in their answer to the first suit: this they omitted to do, and the provisions of Section 13, Explanation II, operated to make the question <i>res judicata</i>	5
" " <i>Ejectment—Omission to direct tenant to file a statement of claim to compensation—Material irregularity.—It</i> is a material irregularity if a Court of first instance omits, in a suit to contest a notice of ejectment, to call upon the tenant to file a statement of his claim, if any, to compensation for improvements or for disturbance, and of the grounds thereof, in pursuance of the directions contained in Section 70, Punjab Tenancy Act, 1887.	
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<i>Village dues.—Atrafi—Public policy.—The</i> levy of atrafi from such persons as are liable to pay the same to the village proprietary body is not opposed to public policy	18

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Z.

Zaildars.—*Hereditary claims, other things being equal.*—Although no right to the office of Zaildar arises from the fact that the claimant is related to the former holder of the office, yet it is equally true that such relationship is no disqualification.

If, among the claimants, it were found that the man who was selected as having the strongest claim on the recognised grounds were also son of the late holder of the office, a Collector might very fairly feel confirmed and supported in his choice.

The dictum, that appointments should, as far as possible, not be of a hereditary character, disapproved.

Punjab Record, Nos. 6 of 1887 and 5 of 1890, Rev., referred to ...

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CIVIL JUDGMENTS,
1892.

Chief Court of the Punjab.

CIVIL JUDGMENTS.

Full Bench.

No. 1.

SULTAN ALI SHAH & OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

KADIR BAKHSH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 848 of 1890.

(ROE, RIVAZ & STOGDON, JJ.)

Right to use of water—Land-suit—Punjab Courts Act, 1884, Section 3—Appeal.

The plaintiff sued to establish his right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4* of the Punjab Tenancy Act, 1887: no claim was made to any share in the land occupied by the canal, or in the canal as a whole.

Held (Roe, J., doubting), that the suit was not a "land-suit" as defined in Section 3, Punjab Courts Act, 1884 (as amended).

Further appeal from the decree of H. B. Beckett Esquire, Divisional Judge, Derajat, dated 6th February 1890.

K. P. Roy and Mukerjee, for appellants.

Ishwar Das, for respondents.

The plaintiffs sued to establish their right to use the water of the Dabgana Canal for irrigating land as defined in Section 4 of the Tenancy Act, 1887. At the first hearing of the appeal, a preliminary question arose as to whether the suit was a "land-suit," as, if not, no further appeal would lie without a certificate from the Divisional Judge under Section 40, sub-section (1) (d), Punjab Courts Act.

* Section 4.—"Land" means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes the sites of buildings and other structures on such land.

The Division Bench (Stogdon and Beachcroft, JJ.) made the following reference to a Full Bench—

20th July 1891.

STODON, J.—This is a suit to establish a right to use of water of the Dabgana Canal for irrigating land, as defined in Section 4 of the Tenancy Act, in the mode laid down in the Settlement Record. It was valued at Rs. 2,000 in the Courts below, but under rule IV of the rules framed under the Suits Valuation Act its value does not exceed Rs. 500. If, then, the suit is an unclassified one, no appeal lies to this Court without a certificate from the Divisional Judge; but it is urged that it is a land-suit, and a ruling of the First Bench in Civil Appeal No. 1383 of 1889 is quoted as an authority in support of this contention. As we are not, as at present advised, prepared to concur with it, and the two cases, though somewhat different, do not appear to be practically distinguishable, we refer the question whether the present is a land-suit to a Full Bench for decision.

The following opinions were delivered by the Full Bench :

7th Dec. 1891.

ROE, J.—As stated in the order of reference, this is a suit to establish a right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4 of the Tenancy Act. No claim is made to any share in the land occupied by the canal, or in the canal as a whole. The question referred to us is whether the suit is a “land-suit.”

To answer this question, it is convenient to consider separately the grounds on which it may be urged that the suit is a land-suit. These grounds are: (1) that it is a land-suit *quoad* the canal in which the right is claimed; (2) that it is a land-suit *quoad* the land on behalf of which the right is claimed.

In support of the first ground, an unpublished judgment of this Court, No. 1383 of 1889, is relied on, and is indeed the cause of the present reference. It is true that in that case the land occupied by the water-course was originally the plaintiffs' but the plaintiffs did not claim a share in the land so occupied, or in the water-course as a whole: they merely claimed the use of the water under an agreement alleged to have been made with the constructors of the water-course. It was considered that the water-course itself was land as defined by the Tenancy Act, inasmuch as it was occupied for purposes subservient to agriculture, and that, although the claim was not for any part of the water-course, it was for a right relating to it, *viz.*, a right to take water from it, and the water could not be separated from the water-course.

I do not doubt that a water-course used for purposes of irrigation is "land" as defined by the Tenancy Act, just as it has been held in *Punjab Record*, No. 62 of 1891, that a well so used is "land." I would observe, however, that the latter judgment, which was delivered by myself, hardly brings out sufficiently the distinction between buildings and structures and their sites. Section 4 of the Tenancy Act does not make any buildings or structures *themselves* land: it merely says that the term land "includes the *sites* of buildings and structures on such land," *i.e.*, on land let or occupied for purposes subservient to agriculture. As a fact, claims to a share in a well or water-course do generally include a claim to the site, and are thus claims for or relating to land as defined by Section 4. But it appears to me quite easy to conceive claims to the structure alone which have no reference to the site,—for instance, claims may be made to the woodwork of the well or of *jhalars* on the water-course, or to the bricks with which the well or an aqueduct is constructed, although no claim whatever is made to the land.

And if the structure itself is thus separable from the land, it appears to me that the water flowing over, or standing in the land, whether or not a masonry structure intervenes between it and the land, is equally separable. That it is physically separable is beyond doubt, and the right to the water is also, in my opinion, separable, although the site of the water-course or well may, as already explained, be land; yet other persons may have a right to take the water for various purposes, and the right may rest on various foundations. A man may by paying an annual sum obtain from the owner of an irrigation canal the right to place in it a wheel which will thus work by water-power machinery: he may acquire, either by express agreement, or by way of easement, a right to take for domestic purposes water from a well the site of which is land within the meaning of Section 4. I think it impossible to suppose that the Legislature ever intended that suits to enforce these rights should be considered land-suits; nor do I think that they are so on a proper construction of the Tenancy and the Punjab Courts Acts.

I think, therefore, that the present suit is not a land-suit *quoad* the water-course, or rather the water, in which the right is claimed. It remains to be considered whether it is a land-suit *quoad* the land for the irrigation of which the water is claimed.

It appears to me clear that the mere fact that the *purpose* for which the water is to be used is to irrigate land does not affect the case. If a zamindar, for the purpose of manuring his land, purchased a quantity of sewage from the Municipal Committee, a suit brought with reference to this sewage could hardly be called a land-suit: if he purchased from the Committee a right to take a certain supply of water from their water-works, intending to convey this water in casks to his land and use it for purposes of irrigation, it would be equally impossible to class a suit relating to this purchase as a land-suit.

But although the mere fact that the water is required for the irrigation of agricultural land would not make the suit a land-suit, it may be that the grounds on which the claim is made affect the nature of the suit. The water, or the right to take water in a particular way, may be claimed, not as a right acquired by the plaintiff or his predecessors for themselves, but as a right inherent in the land itself. It may be said that the owner or occupier of the land for the time being is suing, not on behalf of himself but on behalf of the land.

I think that such a right must be considered a right or interest in land, and that a suit to enforce it is therefore a land-suit.

Whether, on the above view of general principles, the present suit is a land-suit, which is the question actually referred to us, I am not at present prepared to say. The case was argued before us with reference to general principles only, and I think that the parties' pleaders should be allowed a further hearing as to what is the true basis of the present claim before a final answer is given.

RIVAZ, J.—I concur generally in the above judgment, reserving my opinion only as to the last point decided; and I also think it desirable to hear further argument before giving a final answer to the reference.

STODDON J.—I concur.

The final opinions of the Full Bench were delivered as follows:

2nd Jany. 1892.

RIVAZ, J.—A "land-suit," according to the definition in Section 3 of the Punjab Courts Act (as amended) means—

- (a) a suit relating to land;
- (b) a suit relating to any right in land;
- (c) a suit relating to any interest in land;

the "land" in each case being land as defined in Section 4 of the Punjab Tenancy Act, *viz.*, land which is not occupied as the site of any building in a town or village, and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, the term including the sites of buildings and other structures on such land.

The suit out of which the present reference has arisen is, as stated by the learned Senior Judge, a suit to establish a right to the use of water of a certain canal for the irrigation of certain land, which comes within the definition in Section 4 of the Tenancy Act, and brought by the owner of that land. The claim is for the water only, and does not include any claim to the canal itself or the land occupied by the canal.

The question referred is, whether the suit is a "land-suit." I confess that the answer to the question appears to me to involve considerable difficulty; and the remarks which I am about to make, after giving my very best consideration to the subject, are made with very great diffidence, and not without my feeling sensible that I may not have succeeded in grasping the full intention of the Legislature in enacting the definition which has to be considered.

I will first attempt an expression of opinion as to the real meaning of the phrase "*relating to*" land, for I think it desirable to avoid a false start by, at the outset, putting too wide an interpretation upon those words. I would first premise that the expression "*suit relating to land*" was certainly *not*, in my opinion, intended to mean, nor should the words be construed as meaning "*suit for any right relating to land.*" //

At the same time, I think that the language was intended to be less restrictive than the expression "*suit for land.*" A *suit for land* might be held to mean little more than a suit for possession of land, whereas the words "*suit relating to land*" would include, and I think were meant to include, suits for a declaration of right in land, for pre-emption of land, for redemption of a mortgage of land, and so on,—all suits, in fact, where the subject matter is practically the land, and the claim relates directly to that land. What I am trying to emphasise is, that I think the part of the definition which I am now considering must be limited in its construction so as to include only suits which actually relate to the land itself, and so as to exclude suits for something connected with land, which might be colloquially described, but which I venture to think

would be loosely and inaccurately described, as “suits *relating to land*.” If the above view be correct, the present suit is not a suit “relating to land,” but a suit relating to water, which is not land, though it is intimately connected with, and is used for the irrigation of, land. So far, I believe that I am quite in accord with the opinion expressed by Mr. Justice Roe; and I would add here that I concur generally in all that he has said when discussing the question whether the suit is a land-suit, *quoad* the canal in which the right is claimed.

The next question to be considered is, whether the suit can be said to be one relating to *any right or interest* in land. Now, adopting the above view as to the scope of the words “relating to,” the question for decision becomes narrowed to this,—whether water used for the irrigation of agricultural land is a *right or interest* in that land. Mr. Justice Roe, as I understand, considers that it may be a right in land, if the right to the water is inherent in, or attached to, the land itself: if the right is claimed, not as one acquired by the owner or occupier of the land, but as belonging to the land. Now I feel considerable difficulty in accepting the above view, and still further difficulty in holding that the above view (if accepted) would render the present suit a “land-suit.” To take the last point first, I doubt whether the water claimed in the present case can be said to be a right inherent in, or attached to, the land. No doubt the right is claimed by the owner of the land for the irrigation of the land, and in one sense the right may be said to be attached to the ownership of the land. But the proprietor is not bound to use the water for any particular land. He is, from his point of view, owner of the water as well as owner of the land, and he can use the water for any purpose he pleases apart from the land. Moreover, I doubt for another reason whether the water in question is attached (in the sense, at least, of being irrevocably attached) to the land. The water itself, as I understand, is the property of Government, and could be diverted to other uses if Government were so inclined. But, even assuming that the right to the water can be said to be a right inherent in the land, I still question whether the suit for that water could be said to be a suit relating to a right in land. I do not consider that the expression is synonymous with “right connected with, or appertaining to land.” The right claimed must be a right in land, and it is not enough, I think, to show that it is a right inherent in land.

As at present advised, I would reply to the reference that the suit is not a "land-suit," as it neither relates to land, nor to any right or interest in land.

STODOL, J.—I concur generally in the judgment of Mr. Justice Rivaz. The suit certainly does not relate to land. It relates to water. Does it then relate to any right or interest in land? I do not think it does. It relates to a right or interest in water. The right in question may be claimed as belonging to certain land, but there is a great difference between a right or interest appertaining to land, and a right or interest in land. In the former case, the owner of the land is the owner of it, plus a certain right. In the latter, he is the owner of it, minus a certain right. 11th Jan. 1892.

The criterion is the nature of the thing claimed, and not that of the thing by virtue of which the claim is made. I quite concur with Mr. Justice Roe that it may be said that the owner or occupier of the land for the time being is suing, not on behalf of himself, but on behalf of the land; but this fact cannot, in my judgment, affect in any way the nature of the thing claimed, which it derives from itself and not from the person or thing by whom, or by virtue of which, it is claimed. To hold otherwise would, in my opinion, operate to revolutionise the nature of claims.

I would therefore reply to the question referred, that the suit is not a land-suit.

ROE, J.—The reasons given by my learned colleagues for differing from the view previously expressed by myself are very forcible. I cannot say that I am wholly convinced by them. The question, what was the true meaning of the Legislature in using the words "right or interest in land," is certainly a very difficult one, and I have searched the proceedings connected with the passing of the Punjab Courts Act and the Punjab Tenancy Act in vain for anything that would indicate the meaning. I am by no means certain that the interpretation given to the words by my learned colleagues is not the correct one, but I am hardly prepared to say expressly that I concur in it. The answer to the reference must be as proposed. 22nd Jan. 1892.

No. 2.

APPELLATE SIDE. {

BISHEN SINGH & AUTAR SINGH,—(DEFENDANTS),—
APPELLANTS,*Versus*

KISHEN CHAND,—(PLAINTIFF),—RESPONDENT.

Case No. 1061 of 1889.

(FRIZELLE & RIVAZ, JJ.)

Hindu law—Joint undivided family—Survivorship—Principles governing question whether a partition has taken place.

Plaintiff sued to recover the amount of principal and interest alleged to be due on a bond executed by K. S., deceased, who died in 1884, leaving a widow and two brothers, all three being made defendants in the suit.

The first Court decreed the claim against the two brothers only to the extent of the principal sum named in the bond, together with simple interest.

The two brothers appealed to the Chief Court, contending that they and the deceased formed a joint Hindu family, and that they consequently took the whole of the joint property by survivorship, and were therefore not liable for the present debt of the deceased.

Held, after enquiry upon remand, that the previous litigation which had taken place between the parties effected such a separation of interests as to have destroyed the jointness of the estate according to the principle enunciated by the Privy Council in *Appovier's* case and other subsequent decisions.

The principles and authorities governing the question whether a partition can in any case be held to have taken place, in fact or in law, stated and discussed.

First appeal from the decrees of Rai Buta Mal, District Judge, Ferozepore, dated 31st May 1889.

Rattigan, for appellants.

Gouldsbury, for respondent.

The facts, and the questions of law arising in connection therewith, are fully stated in the judgment of the Chief Court which was delivered by

6th Jany. 1891.

RIVAZ, J.—This is a suit by plaintiff to recover the amount of principal and interest alleged to be due upon a bond executed by the late Guru Kabal Singh. Kabal Singh died in October 1884, leaving a widow, Mussammat Ganga Devi, and two brothers, Gurus Bishen Singh and Autar Singh, him surviving. These are the three defendants in the case. It appears that after the death of Kabal Singh, *vis.*, in May 1885,

Bishen Singh and Autar Singh instituted a suit against Mussammat Ganga Devi for one-third of the whole family estate, alleging that the property was joint and undivided, and that the defendant's right was to receive maintenance only, and not a share of the estate. It was admitted that on Kabal Singh's death, *dakhil kharij* of his one-third share took place in favour of the widow. This suit was settled by a written agreement, dated the 21st January 1886, under which Ganga Devi accepted a cash maintenance for herself and her mother-in-law, and a house to live in, and renounced all rights in the immoveable property of her husband's share, except a lien thereon for the maintenance agreed upon. It was also agreed that the brothers, and not the widow, would be liable for all the debts due by the deceased Kabal Singh.

The first Court has decreed the present claim to the extent of the principal sum named in the bond, together with simple interest, against Bishen Singh and Autar Singh only; and these two last named defendants are the appellants before us.

The main question raised by the appeal is an amplification of the original pleas of defendants 1 and 2 in the first Court, to the effect that they and the deceased formed a joint Hindu family, and consequently take the whole of the joint property by survivorship, and are therefore not liable for the personal debts of the deceased. It is contended before us that the above plea is a good answer to the suit, for the reasons stated by Mr. Mayne in Sections 305—307 of the 4th edition of his *Treatise on Hindu Law and Usage*, and the decision of the Privy Council in *Suraj Bunsî Koer's* case (I. L. R., 5 Calc. 148) was specially relied upon.

The foundation of the appellant's argument admittedly is, that the two defendants, who are appealing, and their deceased brother, were joint in estate when Kabal Singh died in 1884; but it appears that this statement of fact is denied by the respondent's counsel, and an examination of the record in the present case shows that the question, whether the brothers were undivided coparceners or not, has not been put in issue, or decided, nor is there any evidence upon the present record throwing any light upon the question. The defendant, no doubt, pleaded the jointness of the brothers, and the plaintiff's pleader contented himself with a general statement that he traversed all the pleas. It is to be regretted that the Court

accepted such a general replication. It should have examined the parties, and thus ascertained the exact points upon which they were at issue. The consequence of this neglect on the part of the Court to obey the injunctions contained in Section 117, Civil Procedure Code, is that, before proceeding further with the case, we must send down, under Section 566, Civil Procedure Code, the following issue to the lower Court for trial: Were Kabal Singh and his two brothers, the present defendants, joint owners in an undivided estate at the time of Kabal Singh's death in 1884; or were all or either of them separate the one from the other?

Before recording the evidence which either party may wish to produce upon the above issue, the Court should carefully examine each party, so as to elicit exactly what are the respective allegations of each side with regard to the property being joint or separate. Especially the plaintiff should be required to state with precision the nature of the separation which he alleges to have taken place between the brothers.

The lower Court, after trying the above issue, will return its finding thereon, together with the evidence, to this Court, with as little delay as possible.

On receipt of a return to the above order of remand, the judgment of the Court was delivered by

2nd Jany 1892.

RIVAZ, J.—We have now considered the return to our order of the 6th January and heard full arguments. It is conceded on behalf of the respondent that if the fact be established that the defendants and their brother, Kabal Singh, formed an undivided family, then the plaintiff's suit must fail, upon the principle stated in our former order, and recently reaffirmed by their Lordships of the Privy Council in *Madho Parshad v. Mehrban Singh* (I. L. R., 18 Calc., 157). For in such case the defendants, having taken by survivorship the undivided share of their deceased brother, cannot be held responsible, even to the extent of that share, for the personal debts and obligations of that brother. The main contest in the case, as presented to us, has therefore been as to whether or no a partition has taken place, and this question, as well as that relating to the consequences of a partition having or not having taken place, has been argued before us on both sides as one governed by the Hindu law of the Mitacshara as in-

terpreted by the rulings of the Privy Council, neither party having suggested that any of the matters of controversy is governed by a custom opposed to the Hindu law. Lastly, it may be noted that no other ground for interfering with the lower Court's decree in plaintiff's favour was urged, except the non-liability of the defendants to pay their deceased brother's debts, for the reasons already stated.

The return is to the effect that no partition has been established, but that the three brothers remained a joint undivided family up to the death of Kabal Singh. This finding is challenged by the respondent's counsel, who urges that what amounts to a partition under Hindu law has been established in at least three ways :

- (1) by proof of a separation of interests, and actual separate enjoyment by each brother of his one-third share, the family being also separate in food, though no division of the property by metes and bounds is alleged ;
- (2) by the fact that the entries in the revenue papers define the share of each brother, though the estate is entered as joint ;
- (3) by previous litigation between the parties, which has of itself effected a partition of the family property.

It may be well, before proceeding further, to state clearly the leading principles, as enunciated by the Judicial Committee, which govern the decision of the question, whether a partition can be held to have taken place in fact or in law. The leading case is *Appovier v. Rama Subba Aiyar* (11 Moore's Ind. App., 75), and the gist of what their Lordships said upon the subject in that case is as follows : When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and enjoy in severalty, though the property itself has not been actually severed or divided. There may be a division of title, without division of the subject to which the title is applied : a division of the right without a division of the property by actual partition by

metes and bounds. The fair inference from the decision (say their Lordships in a later case, *Doorga Pershad v. Mussammatt Koondun Koowar*, 13 B. L. R., 235) seems to be that, inasmuch as there may be a division of the kind there spoken of, viz., a division which, though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, was to effect such a division.

To return to Mr. Gouldsbury's three main contentions. The first is almost entirely a question of evidence, and, in my opinion, fails, because there is no reliable testimony of any separate enjoyment by mutual consent by each shareholder of the proceeds of his share, while the indirect evidence as to the state of feeling prevailing among the brothers, and the litigation which followed their father's death, strongly negatives the idea of any mutual arrangement, or separate enjoyment of profits having taken place. It seems clear that separation from commensality had taken place; but this alone does not, as a necessary consequence, effect a division of property or at least of the whole undivided property,—*Revan Pershad v. Mussammatt Radha Beeby* (4 Moore's Ind. App., 137).

As to the second point urged, that also appears to me inconclusive. The rulings of the Allahabad High Court, which were relied upon, *Ram Lal v. Debi Dat* (I. L. R., 10 All., 490, and the earlier cases therein cited), establish no more than this, that separation as to estate may be inferred from evidence of definement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it. The actual point decided was that a separation might be proved in the case of property in the hands of mortgagees, proof of separate enjoyment by the shareholder in such case not being essential. The case is no authority for the proposition that the mere definement of shares will amount to a separation, and the earlier case, *Ambika Dat v. Sukhmani Kaur* (I. L. R., 1 All., 437), which is approved, is directly opposed to any such contention. It seems obvious, too, that where the test is whether there has been an unmistakable intention on the part of the shareholders to separate their interests, a mere entry made for fiscal purposes in the revenue records can scarcely be held sufficient to establish any such intention.

But Mr. Gouldsbury's third contention requires much more serious consideration, and to understand the force of his argument, it is necessary to examine closely into the litigation which took place between the brothers after their father's death, which occurred upon the 23rd October 1878. It appears that in 1877, Guru Fattah Singh, the father of the present defendants, Bishen Singh and Antar Singh and Kabal Singh, being displeased with his elder sons (the defendants), executed a will, disinheriting the latter, and appointing his youngest son, Kabal Singh, his heir and successor. This led to a suit being filed in October 1879 by Bishen Singh (the eldest son) against Kabal Singh and Antar Singh, in which the plaintiff, as eldest son, claimed possession of the *whole* of his father's property, moveable and immoveable, alleging that the will was invalid, and that the property went with the *gaddi-nashin*, as to which he further asked for a declaration of his right to succeed. This suit resulted in a decree in plaintiff's favour, passed by the Judicial Assistant Commissioner of Ferozepore on the 17th May 1880, giving him (as against Kabal Singh only) "one-third of the land and house sued for, "and that the remainder of the claim for the land and house "be dismissed; and that the suit in respect of the moveable "property and also in respect of the office of Guru, and for the "book and beads of Guru Nanak, be dismissed." Bishen Singh appealed to the Commissioner, with reference to the moveable property and the succession to the *gaddi* and the custody of the book and beads. Kabal Singh urged, by way of cross-appeal, that the property should have been divided by the *chunlavand* rule. I should have mentioned that Guru Fattah Singh had two wives, and that Bishen Singh and Antar Singh were the offspring of one wife, and Kabal Singh of the other. The Commissioner dismissed Bishen Singh's appeal as to the moveable property, but reversed the Judicial Assistant Commissioner's order as regards the succession to the *gaddi* and the custody of the book and beads. The *pagwand* division of the immoveable property was upheld. Kabal Singh then appealed to the Chief Court as to the succession and the book and beads only, but his appeal was rejected on the 25th January 1883. Meanwhile, Antar Singh had filed a suit against Kabal Singh for possession of his one-third share of Guru Fattah Singh's estate, reciting that Bishen Singh had obtained a decree for his third. The claim was decreed on the 20th October 1880, and the final decree ordered that "plaintiff be

"put in possession of 87,766 kanals, one-third of the estate of "Guru Fattah Singh, and *haq malikana* as claimed." There is nothing to show that either of the final decrees in the above litigation was followed by any actual partition in execution. Kabal Singh died in October 1884, and in May 1885 Bishen Singh and Antar Singh joined in a suit against his widow, Mussammat Ganga Devi, the object of which was to oust the defendant from Kabal Singh's one-third share of the family property, the allegation being that the property was still undivided, and the widow, therefore, only entitled to maintenance. This suit resulted in a compromise, as has been stated in our former order.

The effect of the above litigation upon the question which we have to decide must be determined with due attention to the decision of the Privy Council in *Joy Narain Giri v. Girish Chander Myti* (I. L. R., 4 Cal., 434). In that case, their Lordships held that although a suit by a member of a joint Hindu family against his co-sharers for a separate share of the joint estate be not in terms a suit for partition, yet, if it appear that the intention of the plaintiff was to obtain the share which he would be entitled to on a separation, and the decree passed in the suit assigns him that share, such decree does, in fact, effect a partition, at all events of rights, which under the doctrine laid down in Appovier's case is effectual to destroy the joint estate.

Their Lordships in their judgment distinguished and approved of a case to which their attention had been called in the argument, *Debee Pershad v. Phool Koeres* (12 W. R., 510), pointing out that the suit in that case was for a declaration of a right to a share in the estate, which suit would not be inconsistent with an intention on the part of the plaintiff to obtain a declaration of his being entitled to a joint interest in a joint estate. I have also referred to the case of *Chidambaram Chettiar v. Gauri Nachiar* (I. L. R., 2 Mad., 83), where the Judicial Committee construe a decree as tantamount to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date according to the principle of Appovier's case, though the actual division of the property was not complete.

After carefully considering the whole question, I have come to the conclusion that the litigation referred to must be

held to have effected such a separation of interests as to have destroyed the jointness of the estate according to the principle enunciated in Appovier's case, and in subsequent decisions. In considering the effect of litigation between members of the family upon the question, we must, I think, specially regard two main points, first, the intention of the parties as evinced by their conduct and pleadings; secondly, the actual terms and result of the final orders passed in the litigation. As to the first point, I think a great deal may be said upon either side as to whether the parties intended separation or to establish joint interests in a joint estate. But as to the second point, I think it must be held that the final decrees effected a separation of rights, whatever may have been the intention with which the parties started the litigation. For not only are the decrees in terms for separate possession, but the result of the litigation was to decide, as regards the ancestral estate, that whereas the immoveable property was divisible equally between the three brothers, the moveable property, by virtue of Guru Fattah Singh's will, all descended to the youngest brother, viz., Kabal Singh. Now it seems to me that a joint family owning the ancestral immoveable property in ascertained shares, but in which all the moveable property belonged to one member alone, would be a contradiction in terms; and I therefore think that the litigation between the brothers must be taken to have effected a disruption of the joint family, and that, therefore, the rule of survivorship is inapplicable to the facts of the case, the rule of survivorship is inapplicable to the Kabal Singh present case. As to the subsequent suit against the widow, this might be considered as affording evidence of the intention of the parties to the previous litigation, were such intention the crucial test for the decision of the present case, which I have tried to show is not the case. But after all, the evidence would not be of very great value, inasmuch as the object of the then plaintiffs, in stating that the family had remained joint in order to oust Kabal Singh's widow from her husband's share in the property, is too obvious to need any further comment.

I would dismiss the appeal with costs.

FRIZELLE J.—I concur.

Appeal dismissed.

No. 3.

APPELLATE SIDE. }

KHAN MUHAMMAD & OTHERS,—(DEFENDANTS),—
APPELLANTS,*Versus*

JALAL-UD-DIN,—(PLAINTIFF),—RESPONDENT.

Case No. 1348 of 1890.

(BENTON & RIVAZ JJ.).

Arbitration—Consent of all the parties to the suit—Section 506, Civil Procedure Code—Appellate Court remanding an appeal under Section 562 as regards one defendant and dismissing the appeal as regards the other defendants—More than one decree in same suit.

J. sued D. B., the mother of the girl, and the girl's three uncles, for Rs. 1,000 damages for an alleged breach of a betrothal contract. After settlement of issues, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. D. B., the mother, did not sign the agreement, but K. M., one of the uncles, stated that he was representing her and that he joined her in the reference to arbitration with her full knowledge and consent.

An award was given in favour of the plaintiff, upon which judgment and decree followed against all four defendants.

Upon appeal by the defendants, the Divisional Judge held that the award was inoperative as regards D. B., unless it could be shown that she had ratified the submission to arbitration, but that the award was good as regards the parties who had consented to the reference. The Divisional Judge accordingly remanded the case under Section 562, Civil Procedure Code, for decision as regards D. B., and dismissed the appeal as regards the three male defendants.

Held, on further appeal, that the decree of the Divisional Judge was bad in law. He could not legally dispose of the appeal finally as regards the three male defendants and reopen the case by a remand as regards the fourth,—the almost inevitable result of such procedure being that, eventually, there would be more than one, and possibly conflicting decrees in the one suit.

Observations on the question whether D. B. was a party to the reference to arbitration. *Punjab Record*, No. 4 of 1882 (F. B.) and No. 170 of 1883, referred to.

Further appeal from the decree of C. P. Bird Esquire, Additional Divisional Judge, Amritsar, dated 19th July 1890.

Fazl Din, for appellants.

Ganpat Rai, for respondent.

The facts arising in connection with this appeal, and the questions of law incidental thereto, sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—This was a suit for damages for an alleged breach of a betrothal contract, the defendants being Mussamat Daulat Bibi, the mother of the girl, and her three uncles, Jan Muhammad, Khan Muhammad and Jamal-ud-din. After issues had been fixed, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. Mussamat Daulat Bibi did not sign the agreement, but Khan Muhammad stated that he was representing her, and had joined her in the reference with her full knowledge and consent. An award was eventually given in favour of the plaintiff, and the first Court, after hearing objections, gave judgment in accordance therewith against all four defendants. The latter appealed to the Divisional Judge, and urged, *inter alia*, that the decree was appealable and open to objection because all the defendants did not join in the reference. The Divisional Judge, citing the Full Bench Ruling, No. 4, *Punjab Record*, 1882, and other decisions of this Court, came to the conclusion that the award was inoperative as regards Mussamat Daulat Bibi, unless it could be shown that she had ratified the submission to arbitration. But he held that the award was good as regards the parties who had consented to the reference. The Divisional Judge, therefore, remanded the case for decision as regards Mussamat Daulat Bibi, and dismissed the appeal as regards the other three defendants. 8th Jan'y. 1892.

The latter appeal to this Court, and one of the grounds of their appeal is that the Divisional Judge's order is bad in law, as he could not remand the case for redecision *quâ* one of the appellants, and uphold the decree as against the other three. We think that this contention is perfectly correct, and we regret that the Divisional Judge should have failed to see the patent illegality of such an order, and the anomalous results which would almost certainly arise therefrom. The Divisional Judge could not remand the case for a fresh decision with regard to any of the parties, inasmuch as the first Court did not dispose of the case upon a preliminary point, and a first appellate Court cannot remand a case for a second decision, except as provided in Section 562, Civil Procedure Code (*vide* Section 564). Nor could the Divisional Judge legally dispose

finally of the appeal before him as regards three of the defendants and reopen the case by a remand as regards the fourth, the almost inevitable result of such procedure being that eventually there would be more than one decree, and possibly conflicting decrees in the case. The Divisional Judge's order must be set aside as bad in law.

We give the following directions to assist the Divisional Judge in the final disposal of the case, it being understood that the observations which are about to be made do not purport to dispose finally of any of the matters touched upon.

The first question appears to be whether Mussammat Daulat Bibi was really a party to the reference. There is evidence on the record that she was, *viz.*, the statement of Khan Muhammad to the effect that he was representing her in the matter of the reference at her request. The Divisional Judge should first come to a decision upon this question after any further inquiry (which he can order under Section 566, Civil Procedure Code), that he may deem necessary. He can also inquire (if he thinks fit) whether there is any reason to believe that Mussammat Daulat Bibi subsequently ratified the reference. If Khan Muhammad was really acting as Mussammat Daulat Bibi's recognised agent when the agreement to refer to arbitration was filed, there appears to us to be nothing in Section 506, Civil Procedure Code, to prevent the application from being effective. There are (we are aware) conflicting rulings of this Court as to whether a recognised agent, as such, can legally submit a matter in dispute to arbitration under the Code (*vide* Civil Judgments Nos. 1 of *Punjab Record* for 1882 and 48, *Punjab Record*, 1882, on the one hand, and No. 170, *Punjab Record*, 1883, *contra*), but we cannot think that the latter decision intended to rule that a recognised agent specially authorised to submit to arbitration cannot legally and effectively join in an application with such object. Speaking for ourselves, we approve of the view expressed in No. 1 *Punjab Record*, 1882, as otherwise the result might be that under no circumstances could a recognised agent join in an application for a reference to arbitration, which we think could not have been the intention of the Civil Procedure Code. If the Divisional Judge finds that Mussammat Daulat Bibi is bound by the agreement to refer, he will next have to consider whether the award is void for illegality upon any grounds urged in the petition of appeal, or which he may (in his dis-

cretion) allow to be urged, though not set forth in the memorandum of appeal. He will then either uphold the decree passed in accordance with the award, or send down issues for the trial of the case on the merits.

If, on the other hand, the Divisional Judge finds that Mussammat Daulat Bibi is not bound by the award, he must consider more carefully the effect of the Full Bench Ruling, No. 4, *Punjab Record*, 1882, and the other decisions quoted. We would observe that the general effect of the above rulings is, that when all the parties have not joined in the reference, a decree passed in accordance with the award which has followed is not final but is open to appeal, and in disposing of the case it is open to the Court to admit the award as relevant evidence as regards the actual parties to the reference. Sometimes the award will be regarded as conclusive evidence, as, for instance, when the suit can be wholly and equitably disposed of as between the parties to the reference only. But when an award purports to bind (as in the present case) all four defendants, and one has to be excluded, because she took no part in the proceedings which led to the award, it appears scarcely equitable to accept the award as conclusive evidence in plaintiff's favour, justifying a decree in full against three defendants, and at the same time to give the plaintiff a chance of obtaining further relief against the fourth defendant. Nor would it be just to the three defendants to allow the plaintiff to elect to accept a decree against the three defendants only, and relinquish their claim against the fourth defendant. These considerations point to the conclusion that, unless the award can be enforced against all four defendants, a trial of the case on the merits is the proper procedure to follow, it still, perhaps, being open to the Court when weighing the evidence to remember that an award was made after a submission to arbitration by the plaintiff and three of the defendants, in which the majority of the arbitrators found a breach of betrothal as a fact proved, and that Rs. 1,000 were a suitable measure of damages.

With the foregoing remarks, we accept this appeal, set aside the Divisional Judge's order, and remand the case to his Court for rededecision.

The stamp on this appeal will be refunded and other costs be costs in the cause.

Cause remanded.

No. 4.

APPELLATE SIDE. {

JERAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus

MANPHUL,—(DEFENDANT),—RESPONENT.

Case No. 1094 of 1889.

(BENTON AND RIVAZ, JJ.).

*Custom—Adoption—Appointment of heir—Sonless proprietor—Hindu
Jats, Tank gôt, Sonapat tahsil, Delhi District.*

M. S., a childless proprietor and an old man, wished to appoint M., a collateral related in the fourth degree from the common ancestor, as sole heir to his property to the exclusion of his other heirs, who were related in the same degree as M.

M. S. executed and registered a deed in which he recited that he had adopted M. and gifted him his land. He further made some sort of declaration before the brotherhood, accompanied probably by some simple ceremonies for the purpose of giving publicity to his already expressed intention to make M. his heir.

M. was about twenty years of age at the time, and up to this period he had not been brought up as a son by M. S., nor had he lived with him, or been married by him, but after the deed was executed M. resided with M. S., who died very shortly afterwards.

The parties were Hindu Jats (Tank gôt) of the Sonapat tahsil, Delhi District.

Found, that the adoption or appointment of M. as heir of M. S. was valid by custom.

Further appeal from the decree of E. W. Parker Esquire, Divisional Judge, Delhi, dated 24th July 1889.

Madan Gopal, for respondent.

The only question in this appeal was as to the validity, or otherwise, of an adoption or appointment of an heir by a childless proprietor of a collateral in the fourth degree from the common ancestor, to the exclusion of other collaterals related in the same degree.

The parties were Hindu Jats of the Tank gôt, residing in the Sonapat tahsil of the Delhi District.

At the first hearing of the appeal, the Court (Frizelle and Rivaz, JJ.) directed a remand under Section 566, Civil Procedure Code, by the following interlocutory order made by

18th May 1891.

RIVAZ, J.—The question here is as to the validity of an alleged adoption among Hindu Jats (Tank gôt) of the Sonapat tahsil.

We find ourselves (after hearing counsel on both sides) unable to come to any satisfactory decision on the present

record, and we must, therefore, remand the case for further inquiry under Section 566, Civil Procedure Code.

The facts appear to us to be that Man Singh, a childless proprietor and an old man, wished to appoint the defendant, Manphul, a collateral related in the fourth degree from the common ancestor, as sole heir to his property, to the exclusion of his other heirs (the plaintiffs), who are related in the same degree as the defendant. On the 21st June 1888, Man Singh executed and registered a deed in which he recited that he had adopted Manphul and gifted him his land. He also made at least some sort of declaration before the brotherhood, accompanied probably by some simple ceremonies for the purpose of giving publicity to his already expressed intention to make Manphul his heir. Manphul was about twenty years of age at the time. Up to this period he had *not* been brought up as a son by Man Singh, nor had he lived with him, nor had he been married by him; but *after* the deed was executed Manphul did reside with the donor, who, however, himself died very shortly after the event.

The questions for decision appear to us to be :

- (1) Whether by the custom of Hindu Jats of the Tank gôt, residing in the Sonapat and neighbouring tahsils, a sonless proprietor can validly appoint one of his collaterals as heir, by acting in the manner in which we have found Man Singh to have acted in the present case, so that the heir so appointed will succeed, to the exclusion of the other collaterals, on the appointer's death.
- (2) Whether, by the same custom, if the transaction is not effective as a valid appointment of an heir, it can be upheld as a valid gift.

Neither of the above questions have as yet been properly investigated. There is no reference in the judgment of either Court, or anywhere on the record, to any *Wajib-ul-arz* or *Riwaj-i-am* bearing on the case, though we think some such documentary evidence of custom must exist. Nor, in fact, has any effort been made to ascertain what are the incidents of the customary power of adoption, or the restrictions (if any) on the power of gift among the tribe to which the parties belong.

We return the case to the District Judge, with a request that he will make himself, or cause to be made, a thorough

investigation into the points noted above, and when the inquiry is complete return the case to this Court through the Divisional Judge, who is requested to add his opinion as to the result of the inquiry.

On a return being made to the above order of remand, the final judgment of the Court was delivered by

4th Jany. 1892.

RIVAZ, J.—The return to the Court's order of remand is in favour of the validity of the adoption, and no objections have been filed by the appellant.

The District Judge had, we consider, no good grounds for misunderstanding the previous order of the Court, and the references therein to the appointment of an heir. The phrase was used, as it frequently is used, as synonymous with the term "adoption" as that expression is applied to the customary adoption common in the Punjab. There was no intention of drawing any distinction between what is sometimes called an adoption and sometimes (and perhaps not less inaccurately) an appointment of heir. This misapprehension on the District Judge's part has, however, fortunately not led to the inquiry being defective or less exhaustive than it would otherwise have been.

That inquiry shows, we think, satisfactorily that Manphul is the validly adopted son, or appointed heir, of the deceased Man Singh, and therefore entitled to succeed to his property. The only ground upon which any serious attempt was made to discredit the adoption was on account of the absence of the collateral's consent. We agree, however, with the lower Courts that such consent is not shown to be one of the essentials of a valid adoption among the parties concerned. The *Riwaj-i-am* is in favour of the validity of the adoption in the present case.

The appeal is dismissed with costs.

Appeal dismissed.

No. 5.

ALI MIR,—(PLAINTIFF),—APPELLANT.

Versus

GULAB DIN & OTHERS,—(DEFENDANTS),—RESPDTS.

Case No. 1041 of 1890.

(BENTON & RIVAZ, JJ.)

Suit for land awarded at partition of whole culturable land of village—Parties—Duty of appellate Court.

The plaintiff sued eleven defendants for possession of a small corner of *gorah* land which had been awarded to him at a partition of the whole culturable land of the village.

APPELLATE SIDE. }

The Court of first instance impleaded the whole proprietary body as co-defendants.

In his appeal to the Divisional Court, the plaintiff again made the eleven original defendants, respondents.

The Divisional Judge rejected the appeal on the ground (*inter alia*) that the whole of the proprietary body had not been made respondents.

Held, that the Divisional Judge was not justified in rejecting the appeal for want of parties, there being no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by appellate Courts. Two courses were open to the Court:

- (1) to decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court; or
- (2) to have used the power given it by Section 559, Civil Procedure Code, if the Court considered it necessary, and to have directed that the other defendants be made respondents.

Held, also, that the suit (which was instituted while the Punjab Land Revenue Act, 1871, was in force) was not excluded from the cognizance of the Civil Courts by the provisions of that Act.

Further appeal from the decree of Colonel H. J. Lawrence, Divisional Judge, Ferozepore, dated 7th July 1890.

K. P. Roy, for appellant.

Madan Gopal, for respondents.

The plaintiff's appeal to the Divisional Judge having been rejected upon two preliminary points, he preferred a further appeal to the Chief Court. The points of law involved are stated in the judgment of the Chief Court which was delivered by

RIVAZ, J.—The Divisional Judge has rejected the plaintiff's appeal upon two grounds: 6th Jany. 1892.

- (1) because he appealed against eleven defendants only whereas the lower Court had impleaded the whole proprietary body of Pana as co-defendants;
- (2) because the plaintiff's suit is, in his opinion, not maintainable.

We think that the Divisional Judge is wrong upon both points.

Plaintiff sued eleven defendants only, and maintained, and still maintains, that he can obtain full relief against them alone. For this reason, when his suit was dismissed by the first Court, he lodged an appeal against the same eleven defendants only. Now, we consider that two courses were open to the Divisional Judge, first, to decide the appeal as between the parties before him, leaving with the plaintiff the risk of not having brought the other defendants before the Court; secondly, to use the

power given by Section 559, Civil Procedure Code, if he considered it necessary, and direct that the other defendants be made respondents. The Court was not justified in dismissing the appeal for want of parties, and we see no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by appellate Courts.

As to the second ground of the Divisional Judge's decision, what we presume he means is that the suit being one for possession of property awarded to the plaintiff at a partition by the revenue authorities, and not subsequently taken possession of, is not cognizable by the Civil Court. The suit was filed before the Land Revenue Act of 1887 came into force, and the point must, therefore, be decided under the law as it stood previous to the passing of that Act. Under Section 65 (2) of Act XXXIII of 1871, the Civil Courts were forbidden to take cognizance of "claims against one another, as to partition, by persons who do not contest the correctness of the entries in the record of rights," and this section has been interpreted in Civil Judgments Nos. 164, *Punjab Record*, 1882, and 134, *Punjab Record* 1879. We do not consider that the above clause forbids the Civil Courts to entertain a claim for possession of a small corner of *gorah* land awarded to plaintiff at a partition of the whole culturable land of the village, merely because he cannot affirm that he took physical possession of that particular plot. There is no reason to doubt in the present case that the partition was completed, and that actual possession followed of the greater part of the subject of the partition. Surely it may be presumed that plaintiff got at least formal possession of the portion of land now in dispute, and that, as it is now occupied by the defendant, he can sue to oust the latter in the Civil Courts, and is entitled to succeed in his suit, unless the defendant can rebut the case set up in the plaint.

This appeal must be accepted and the case returned to the Divisional Judge that he may dispose of the appeal to his Court upon the merits.

The Divisional Judge can use his own discretion in the matter of parties. He can either allow the appeal to proceed as between the parties already on the record, or take action under Section 559, Civil Procedure Code.

The stamp on this appeal will be refunded, and other costs will be costs in the cause.

Cause remanded.

No. 6.

MUSSAMMAT MAKHAN DEVI,—(DEFENDANT),—
APPELLANT,

Versus

ASA SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 929 of 1891.

(RIVAZ, J.)

Remand order made under Section 562, Civil Procedure Code—Duty of appellate Court hearing appeal from such order under Section 588 (28).

An appellate Court hearing an appeal preferred under Section 588 (28), Civil Procedure Code, 1882, from an order of remand passed under Section 562 by a subordinate appellate Court, is not necessarily confined to considering the question, whether the order of remand impugned is justified by the terms of the section, but may, when a preliminary point is found to exist, enter into and decide upon the merits of such preliminary point. But as soon as it is held that the remand order appealed from is not warranted by the terms of Section 562, inasmuch as the case has not been disposed of by the lower Court upon a preliminary point, the Court hearing the appeal under Section 588 (28) cannot enter upon or in any way deal with the merits of such remand order.

I. L. R., 7 All., 136 and 17 Calc., 168, followed.

Appeal under Section 588 (28), Civil Procedure Code, from an order of remand under Section 562 made by E. W. Parker Esquire, Divisional Judge, Lahore.

Grey, for appellant.

Higgins, for respondent.

This appeal raised the question as to the duty of an appellate Court hearing an appeal preferred under Section 588 (28), Civil Procedure Code, 1882, from an order of remand passed by a subordinate appellate Court under Section 562. The facts sufficiently appear from the judgment.

RIVAZ, J.—The plaintiff Asa Singh sued three defendants (1) Attar Singh, (2) Mussammat Makhan Devi, and (3) Teja Singh, for possession of various separate properties, which each defendant was alleged to have taken under the will of one Ganda Singh, who died in 1883, the allegation being that the said will was void and of no effect. 9th Decr. 1891.

The first Court after investigating the case upon the merits decreed the claim as against defendants (1) and (3), and dismissed it as against defendant (2).

Three separate appeals were then filed in the Divisional Court by defendants (2) and (3) and plaintiff, respectively. The Divisional Judge disposed of all the appeals in one judgment. He held that plaintiff had improperly joined three distinct causes of action against three different defendants, and that such misjoinder was fatal to the maintenance of the lower Court's decree. The Divisional Judge was also of opinion that the merits of the case had not been fully investigated. Apparently the plaintiff's pleader was asked to elect which of the defendants he would proceed against in the present case, if it was found necessary to exclude two out of the three claims, and he then elected to proceed against Attar Singh (defendant 1). The Divisional Judge then proceeded to pass final orders. He held that the plaint must be returned to the plaintiff to enable him to exclude from the suit the claims against Mussammat Makhan Devi and Teja Singh, and he was of opinion that the District Judge who tried the case was the proper officer to carry this order into effect. The Divisional Judge finally accepted all three appeals, and remanded the case under Section 562, Civil Procedure Code, in order that the claims against Makhan Devi and Teja Singh might be excluded from the suit, and the claim as against Attar Singh be redecided on the merits, after the plaint had been amended and a proper opportunity been given to both parties to produce their evidence.

From the above order Mussammat Makhan Devi (defendant 2), and plaintiff, Asa Singh, have filed separate appeals in this Court. The main contention of each appellant is the same, *viz.*, that the first Court not having disposed of the suit upon a preliminary point, the remand under Section 562, Civil Procedure Code, was illegal, and under Section 564, Civil Procedure Code, the Divisional Judge could not remand for a second decision, except as provided in Section 562.

This contention is, I think, certainly correct. The first Court decided the suit, not upon a preliminary point, which either was or could be reversed on appeal by the Divisional Judge, but on the merits. The Divisional Judge held that the decision was open to the objection that the lower Court had contrary to the provisions of the Civil Procedure Code, permitted different causes of action against different defendants to be joined in the same suit. The remand under Section 562, Civil Procedure Code, was therefore not justified by the terms of the section, was illegal, and must be set aside.

On the above view of the case, there is, in my opinion, no other point left for me to decide, sitting as a Judge hearing the appeal allowed by Section 588 (28), Civil Procedure Code, from orders of remand under Section 562. For while I think it is clear that a Judge hearing such appeal is not necessarily confined to considering the question, whether the order impugned is justified by the terms of the section, but may, *when there is a preliminary point*, enter into and decide upon the merits of that preliminary point, I consider it equally clear that as soon as the Judge holds that the order appealed is *not* warranted by the terms of the section, inasmuch as the case has *not* been disposed of by the lower Court upon a preliminary point, he cannot enter upon or in any way deal with the merits of the spurious preliminary point which the Divisional Judge has wrongly held to justify his remand order. All that can be done is to set aside the order under Section 562, Civil Procedure Code, as *ultra vires*, and to direct the lower Court to proceed in accordance with law. The above view of the law is very clearly laid down by a Division Bench of the Calcutta High Court in *Abraham Khan v. Faizunnessa* (I. L. R., 17 Calc., 168), in which decision I fully concur. See also *Sohan Lal v. Azizunnissa* (I. L. R., 7 All., 136).

At the same time, in sending back the case to the Divisional Judge to be disposed of in accordance with law, I may make the following remarks for his guidance. If the Divisional Judge, who will now have to hear the appeal, is of opinion that there has been a misjoinder of different causes of action against different defendants, such as Section 45, Civil Procedure Code, does not permit, and that the proper order to pass is one amending the plaint under Section 53, Civil Procedure Code, by striking out two of the misjoined causes of action, the Court should consider whether Section 582 of the Code does not enable it to take the necessary action. It will then of course be open to the Court before passing final orders to direct any further inquiry under Section 566, Civil Procedure Code, which may appear to be necessary for the proper disposal of the case on the merits.

There is one other point to be noticed with special reference to plaintiff's appeal to the Divisional Court against *Mussammat Makhan Devi*. I am informed that a preliminary objection was taken to the hearing of this appeal on the ground that it was not filed within the period of limitation. I can

find no order of the Divisional Judge disposing of this objection, and the question must therefore be decided before any other orders are passed upon this particular appeal.

I accept both the appeals preferred to this Court, and setting aside the Divisional Judge's orders of remand under Section 562, Civil Procedure Code, I direct him to rehear and dispose of all three appeals to his Court with reference to the foregoing remarks.

The stamp on each appeal to this Court will be refunded. Other costs incurred by any party in this Court will be borne by that party.

Cause remanded.

No. 7.

**BADHAWA SINGH & SOCHET SINGH,—(DEFENDANTS),—
APPELLANTS,**

APPELLATE SIDE. {

Versus

ANAUUKHA,—(PLAINTIFF),—RESPONDENT.

Case No. 1212 of 1889.

(ROE & RIVAZ, JJ.)

Udasi faqir—Abandonment of worldly affairs—Loss of rights of inheritance.

By Hindu law, if a man becomes an Udasi faqir, he abandons worldly affairs and loses his civil rights of inheritance in his natural family. But it is yet possible that a man may resolve to become a faqir of the Udasi sect and yet resolve not to abandon worldly affairs and his civil rights of inheritance, the effect that such a course might have upon his status as a faqir, in the eyes of other Udasi faqirs, not being material.

The true issue in such cases is, did the man on becoming a faqir also intend to renounce and did he renounce the world, the burden of proof that he did not, being upon him.

Further appeal from the decree of Khan Muhammad Hyat Khan, C.S.I., Divisional Judge, Ferozepore, dated 15th August 1889.

The plaintiff, who was an Udasi faqir, sued his two brothers for his share of the estate left by their father. At the first hearing of the appeal the Chief Court (Plowden & Frizelle, JJ.) remanded the case under Section 566, Civil Procedure Code, for trial of the issue whether the plaintiff on becoming a faqir also intended to renounce and did renounce the world. The following judgments were delivered.

FRIZELLE, J.—The question in this case is whether the 7th March 1891. plaintiff, who sues his two brothers for his share of the estate of his father (who died shortly before suit), has lost his rights of inheritance by becoming an Udasi faqir. He admits that he is an Udasi and has inherited the property left by his Guru. It appears that he has been a faqir for the last twenty years and resided away from his native village at the place where he has been leading the life of an Udasi and succeeded to property as such. He pleads, however, that he has not abandoned worldly affairs and therefore has not deprived himself of his right of succession in his own family. The inquiry made is very meagre, and on the real point at issue there has been no inquiry at all. That is, whether as a fact plaintiff has renounced the world since he became a faqir or not. If he has, *prima facie* he is governed by the ordinary Hindu law on the subject, according to which he would forfeit his rights of inheritance in his natural family. But before coming to a final decision we desire that further inquiry should be made on this point:—Has plaintiff renounced worldly affairs, or to what extent has he renounced them? It should be ascertained in particular whether he has engaged in any worldly business besides those of the sect to which he belongs, carried on trade, acquired other property, married, and if he has married, what wife he has married, that is, in the class or caste into which he would ordinarily have married had he not become an Udasi. The case is remanded accordingly under Section 566.

PLOWDEN, J.—The plaintiff is undoubtedly a co-heir unless 7th March 1891. he has lost his rights by becoming an Udasi faqir.

Now, it may be conceded that by the Hindu law, as has been decided in this Court (No. 1 of *Punjab Record*, 1868, and No. 15 of *Punjab Record*, 1874) if a man becomes an Udasi faqir, he abandons worldly affairs and loses his civil rights of inheritance in his natural family. But it is yet possible that a man should resolve to become a faqir of the Udasi sect and yet resolve not to abandon worldly affairs and his civil rights of inheritance. What effect that would have upon his status as a faqir, in the eyes of Udasi faqirs, is not material. In a judgment of this Court No. 29, *Punjab Record*, 1881, it was found that in the Jullundur District persons became Udasi faqirs and did not abandon worldly matters; and an Udasi faqir was held competent to hold and dispose of private

property acquired by himself. There is evidence in the case of *Jahana and Likal v. Jiwan* cited in the first Court, a case of the Moga tahsil, that Udasi faqirs in the Ferozepore District do not necessarily abandon the world.

The plaintiff asserts before us that he is a Jat of the Sidhu *gôt*, which is admittedly his father's *gôt*, and that he is married to a Jat woman of the Sunni *gôt* and has a son by her. The respondent states that this would not be a valid marriage, but can give no reason why it should not be, and that in fact plaintiff is not married, and the woman is his mistress.

Neither Court has perceived or put in issue the real point, namely, whether the plaintiff has abandoned the world. The onus of this lies upon him, and he asserts that he has become a faqir of the Udasi sect, and with them the proper course is to abandon the world, and he ought to have a fair opportunity of proving that he has not.

It may be added that the plaintiff does not appear to be very conversant with spiritual matters, for he asserts that there is no difference between the Udasis and the Bairagis, though he also says that he is an Udasi and not a Bairagi. The cases in this Court (No. 29 of *Punjab Record*, 1881, No. 24 of *Punjab Record*, 1880) seem to show that Bairagis and Udasis in this Province agree in not necessarily abandoning the world on becoming faqirs. However, the true point is whether the plaintiff on becoming a faqir also intended to renounce and did renounce the world; and this is the point for inquiry.

On a return being made to the above order of remand the final judgment of the Court was delivered by

2nd Decr. 1891.

RIVAZ, J. (ROE, J., concurring).—A return has now been received to this Court's order of the 7th March and is to the effect that plaintiff has failed to establish that he has not severed his connection with the world. No written objection has been put in by either party to this finding, but the plaintiff orally contests its accuracy.

We consider, however, that the finding is fully justified by the whole result of the enquiry and should be maintained. Plaintiff has adduced no satisfactory evidence to show that he follows worldly pursuits or what those pursuits are. The

presumption is against him and the burden of proving that he has not renounced the world (as already noted) lies upon him.

The appeal is accepted and the plaintiff's suit dismissed. Each party will pay his own costs throughout.

Appeal allowed.

No. 8.

RAHIMAN & SOHNA,—(PLAINTIFFS),—APPELLANTS,

Versus

BALA & OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1038 of 1891.

(ROE AND FRIZELLE, JJ.)

Custom—Wajib-ul-ars—Evidence—Modification of custom.

The parts of a *Wajib-ul-ars* referring to custom are not provisions intended to be in force for a limited period only,—they are statements that a certain custom exists. The statement may or may not be correct, but if it is correct, there would be a natural presumption that the custom continued to exist, and it would be for those alleging that a change had subsequently taken place to prove the allegation.

The production of a later Record of Rights containing entries opposed to the earlier one would no doubt be some proof of such a change, but there would then merely be a balance of evidence on either side: it could not be said that the second Record destroyed or abrogated the earlier one.

Punjab Record, No. 107 of 1887, referred to.

*Further appeal from the decree of Colonel O. H. T. Marshall,
Divisional Judge, Lahore, dated 18th April 1890.*

Grey for appellants.

Golaknath, for respondents.

This was a suit for pre-emption. The lower Courts dismissed the suit, holding that the plaintiffs had no preferential right, and that they had failed to prove any special custom as a basis for such right. The Chief Court remanded the case under Section 562, Civil Procedure Code, by the following judgment which was delivered by

ROE, J.—The lower Courts have dismissed the plaintiffs' 10th Decr. 1891. suit for pre-emption on the ground that they have no preferential right under Section 12 of the Punjab Laws Act, and that they have failed to prove a special custom giving them this right. The pedigree table prepared at the Settlement of 1868 shows that the village is a small one divided into two tarafs, Rupal and Khemi. The proprietors in each

taraf are the descendants of one common ancestor, and taraf Khemi was then still held in ancestral shares. In taraf Rupal the tenure had become *bhayachara*, not by the intrusion of strangers, but by actual possession growing so different from shares that the latter could no longer be followed. It has been contended by the counsel for appellant that taraf Rupal is further subdivided into pattis, and that plaintiff, as a proprietor of the patti in which the land sold is situated, has a superior right to defendant-vendees, who, if proprietors at all, are proprietors in another patti of Rupal. In the records of neither of the two Settlements (of 1857 and 1868) can we find any trace whatever of the existence of pattis or other subdivisions, inside the Rupal Taraf, and we therefore think that plaintiffs cannot succeed on the ground we are now considering. But we are clearly of opinion that they have proved their second ground,—the special custom as provided in the *Wajib-ul-ars*. It is not denied that they are, and that defendant vendees are not *sharkáya-jaddi*, that is, proprietors in the village descended from the same ancestor as the vendor, or that the *Wajib-ul-ars* gives them the first right to pre-emption. But it is contended (1) that the *Wajib-ul-ars* was only in force for the term of settlement, and has since been superseded by the Record prepared in 1868, (2) that the *Wajib-ul-ars* of 1857 is not even a correct exposition of the custom as it existed then, or rather that it shows that no special custom really then existed.

The first contention is clearly incorrect. The parts of a *Wajib-ul-ars* referring to custom are certainly not provisions intended to be in force for a limited period. They are statements that a certain custom exists. The statement may or may not be correct, but if it is correct, there would be a natural presumption that the custom continued to exist, and it would be for those alleging that a change had subsequently taken place to prove the allegation. The production of a later Record of Rights containing entries opposed to the earlier one would no doubt be some proof of such a change, but there would then merely be a balancing of evidence on either side. It could not be said that the second Record destroyed or abrogated the earlier one. But in the present case there has been no contradiction of the earlier Record by the second. At the Settlement of 1868, the form of the Settlement Record was generally altered; as a rule there was

no *Wajib-ul-arz* prepared in the old form as a separate paper; matters which used to be recorded in the *Wajib-ul-arz* were in the 1868 Settlements recorded in other parts of the Record e. g., the description of the tenure of the village, the mode of distributing the revenue, and of managing the common land, were recorded at the foot of the pedigree table, and matters relating to custom were left for record in the *Riwaj-i-am*. Thus, in the pedigree table of this village there is a note that matters relating to the transfer of property have been recorded in the *Riwaj-i-am*. The entry in the latter record certainly does not contradict the old *Wajib-ul-arz*: on the contrary, it says distinctly that transfers of property cannot take place "*bidán*" that is, except to, or without reference to the heirs. The objection, that the entry in the old *Wajib-ul-arz* does not really show the existence of a custom, is equally unfounded. As pointed out in *Punjab Record*, No. 107 of 1887, instances of attempts, whether successful or unsuccessful, to act in a particular manner are not essential to the decision of the question whether those acts are or are not in accordance with custom. It may be sufficient to show the existence of a state of things from which inferences for or against an alleged custom may be fairly drawn. In the present case, the constitution of the village community already described raises the strongest presumption that, as regards pre-emption, the rights of *shurkáyán jaddi* would be fully recognised, and we consider that the entry in the *Wajib-ul-arz* recognising it, is a true exposition of custom, notwithstanding the fact that up to that time no sales had actually taken place. As the only point decided by the lower Courts is that plaintiffs have failed to prove that they possess a right of pre-emption superior to that of the defendant-vendees, and as we consider this decision erroneous, we set aside their decrees dismissing plaintiff's suit, and remand the case to the first Court under Section 562, Civil Procedure Code, for decision according to law. The defendant-vendees will pay plaintiff's costs in this and the Divisional Courts. Costs in the first Court to be costs in the case.

Cause remanded.

No. 9.

BUR SINGH.—(PLAINTIFF),—APPELLANT,

APPELLATE SIDE. {

Versus

RAM SINGH & OTHERS,—(DEFENDANTS)—RESPONDENTS.

Case No. 491 of 1890.

(BENTON & STOGDON, JJ.)

Custom—Alienation—Sindhu Jats, Amritsar District—Collaterals in eighth degree.

Found, that by the custom of the Sindhu Jats of the Amritsar District, collaterals of the eighth degree were not entitled to contest an alienation of his ancestral estate made by a childless proprietor as being made without necessity or consideration.

Punjab Record, No. 56 of 1890, referred to.

Further appeal from the decree of Khan Muhammad Hyat Khan, C.S.I., Additional Divisional Judge, Amritsar, dated 7th January 1890.

Shib Das, for appellant.

Lewin, for respondents.

The parties were Sindhu Jats of the Amritsar District. The plaintiff sought to contest a mortgage of 176 kanals 8 marlas of land made in consideration of Rs. 1,000. The plaintiff was a collateral in the eighth degree, and the question for decision was whether he had any *locus standi* to contest the alienation.

At the first hearing of the appeal, the Court (Rivaz and Stogdon, JJ.) directed a remand under Section 566, Civil Procedure Code, for a more extended inquiry into the question of custom, by the following interlocutory order which was delivered by

28th April 1891.

STOGDON, J.—Plaintiff is a collateral of the mortgagor, Ram Singh, in the eighth degree. The Courts below have concurred in holding that he has failed to prove that he is entitled to contest the alienation made by him. The enquiry made was very meagre, and we are not satisfied that a correct conclusion has been come to.

If plaintiffs had been two or three degrees more nearly related to Ram Singh, there would have been a strong presumption in favour of their right to contest the alienation. As it is, they are Ram Singh's next heirs. They are not very remote collaterals and they live in the same village. Such being the case, we are not at all satisfied that there is no presumption in

their favour. Under such circumstances, we think that further enquiry is necessary and we remand the case to the first Court for enquiry, whether by the custom of the Sindhu Jats of the Amritsar District, collaterals of the eighth degree are entitled to contest an alienation of his ancestral estate made by a childless proprietor on the ground that it was not made for necessity or that no consideration passed. Inquiry should be made from the principal men of the tribe. Instances in which the right to contest an alienation has been upheld or refused should be collated, and, if necessary, a commission issued for local investigation. Return to be made within three months through the Divisional Judge who is requested to record his opinion.

Upon a return being made to the above order of remand, the final judgment of the Court was delivered by

STODON, J.—The further enquiry directed by this Court's order of the 28th April last has now been made. The Munsif examined a number of Zaildars and Chief Headmen, but was unable to ascertain a single instance in which an alienation by a sonless Sindhu Jat proprietor had been contested successfully, or otherwise, by a collateral so remotely related as the eighth degree. Appellant's pleader objects that enquiry was made only from persons residing in the Tarn Taran tahsil and that sufficient time was not allowed for it, but we do not consider that it is likely that further enquiry would tend to throw any additional light on the case. On the whole, we think that the decree of the Courts below must be maintained. Plaintiffs are distant collaterals of the mortgagor Ram Singh. In 1884, two of them, Bur Singh and Rur Singh, sued him and Baga Singh for a declaration that a sale of 51 ghamaos effected by him on the 22nd November 1883 for Rs. 900 was without valid necessity and would not affect their reversionary rights on his death, but it was held that they were not entitled to maintain the suit, and it was dismissed. The vendee, Baga Singh, belonged to another village, while the mortgagee in the present case is a co-sharer in the same village as plaintiff and his mortgagor, though his land is said to be in another patti. The village is no longer exclusively owned by members of the Sindhu tribe, for it appears that some Arains hold land in it. In a case of Punnun Jats of the Tarn Taran tahsil published as *Punjab Record*, No. 56 of 1889, it was found that collaterals of the sixth and seventh degrees were not entitled to contest an alienation in the form of a mortgage made by a sonless proprietor, and

8th Decr. 1891.

plaintiffs in the present case have failed to show a single instance in which collaterals as distantly related as they are to Ram Singh have successfully contested an alienation by a sonless proprietor on the ground that it was not made for valid necessity. On the whole, therefore, we are of opinion that the suit was rightly dismissed, and we dismiss this appeal with costs.

Appeal dismissed.

No. 10.

APPELLATE SIDE. }

MANSABDAR,—(PLAINTIFF),—APPELLANT,

Versus

SADAR-UD-DIN & AHMAD DIN,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1370 of 1889.

(ROE AND FRIZELLE, JJ.)

Custom—Alienation by widow—Kakezais of Naushera, tahsil Pasrur, Sialkot District—Distinction between power of gift and bequest.

Found, that among Kakezais of the village of Naushera in tahsil Pasrur of the Sialkot District, a widow was empowered to make a valid will in favour of her daughters' children. But independently of the mother's act, the daughters were entitled to succeed under the provisions of their father's will.

Semle.—It is not correct to say that, in all cases, no distinction is ever recognised between the power of gift *inter vivos* and the power of bequest by will.

Further appeal from the decree of M. Macauliffe Esquire, Divisional Judge, Sialkot, dated 28th November 1889.

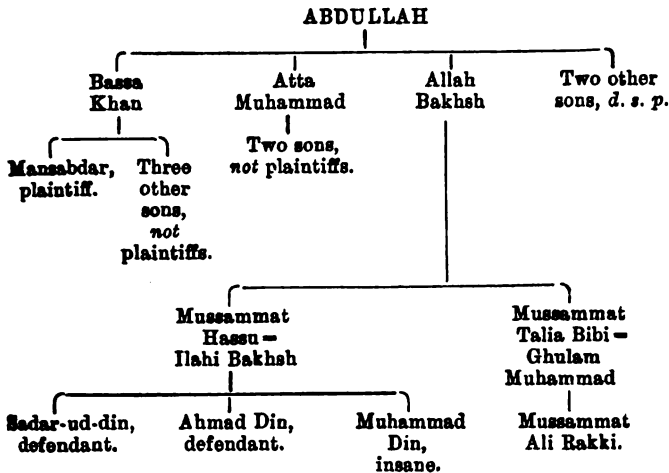
Madan Gopal, for appellant.

Oertel, for respondents.

The parties to this suit were Kakezais of the village of Naushera in the Pasrur tahsil of the Sialkot District.

Exceptional powers of transfer by widows were alleged to exist in this village. This power was challenged by one of the collaterals, but it was found to be established and the plaintiff's suit failed. The facts appear from the judgment of the Court which was delivered by

ROE, J.—The following pedigree table will greatly help 12th Decr. 1891.
us to understand the points of the present dispute:—



The parties are Kakezais of the village of Naushera in the Pasrur tahsil of the Sialkot District.

On the 17th January 1880, Allah Bakhsh executed a deed in which he recited that he was "ill with no hope of life," and declared that he devised (*wasiyat karke tahrir kartu hun*) all his property of every description, valued at Rs. 800, thus: "After "my death, my wife Fazl Bibi will remain *malik*, and have "power over it during her life, and whatever property of mine "may remain after her death, of this my two daughters, "Mussammats Hassu and Talia Bibi, will remain *maliks* in "equal shares, and they will have power to give it to whom "they please and none of my relations will have power to "interfere."

Allah Bakhsh lived some five years after executing this deed, and on his death was succeeded by his widow, Mussammat Fazl Bibi. Mussammat Hassu had apparently died in the lifetime of her father, leaving the sons noted in the pedigree table. On 14th October 1887, Mussammat Fazl Bibi executed a deed in which she recites the deed of her husband devising the estate to her and her daughters, and the fact that a year previously she had sent word to the patwari to enter in the Government Records the property, half in the name of Mussammat Hassu's sons and half in the name of Mussammat Talia Bibi, but she does not know if this was done: as Mussammat Talia Bibi is now dead, therefore she, Mussammat Fazl Bibi, writes (*likh deti*)

the half share of Talia Bibi in the name of Mussammat Ali Rakhi, her daughter, a minor.

The deed goes on to recite that Ghulam Muhammad and Ilahi Bakhsh, husbands of the daughters, have a charge on the property for Rs. 980, money advanced for the support of herself and husband, and that according to the custom of the Kakezais of that village they are heirs in the absence of daughters and their sons, therefore she Mussammat Fazl Bibi writes this will (*wasiyatnamah*), that the children (*aulad*) of her two daughters are *maliks* of her whole property.

Mussammat Fazl Bibi died on 22nd October 1887, i.e., eight days after executing the deed, and on 2nd November 1887 mutation of names was made in the names of the sons of Mussammat Hassu, Sadar-ud-din and Ahmad Din, alone. On 2nd December 1887, the present plaintiff alone of the five nephews of Allah Bakhsh instituted this suit for his share (one-eighth) of the estate. His claim, which was decreed by the first Court, has been dismissed by the Divisional Court, and he appeals to this Court on the ground (1) that neither by custom nor by her husband's will had Mussammat Fazal Bibi any power to dispose of the estate either by gift or will; (2) that although custom allows a gift to a daughter by a father, it does not allow a gift to a daughter's sons, nor are the latter, when a gift has been made, by custom entitled to succeed on their mother's death to the gifted property; (3) that there is an important distinction between gifts and bequests.

To take the last point first, it is stated in Mr. Rattigan's Customary Law, paragraph 55, that there is no distinction between the power of gift and the power of bequest. We are not prepared to say that such a distinction is never recognised, but we do not think that it was contemplated in the *Riwaj-i-am* of the Sialkot District. No doubt the words of Question 13 are: When there are no male children, can a proprietor *in his lifetime* transfer his property to his daughter by a written or verbal act? And *after his death* can his widow do so or not? Here the words in italics clearly point to a distinction between the proprietor's own acts and the acts of his widow.

The answer to the question is generally in the affirmative as regards the man, and in the negative as regards the widow. But on the latter point the answer of the specially Muhammadan group, viz., Sheikhs, Sayads, Moghals, Pathans, Kakezais of the Pasrur tahsil, is this: "A father in his lifetime can transfer

“to his daughter, so can his widow. But amongst the Kakezais, “except in the village of Naushera, in no other village can the “widow transfer.” Four instances are then given of transfers by Kakezai widows.

We should be prepared to hold that this very exceptional power of transfer by a widow is proved to exist in this particular village, and it appears clear to us that Mussammat Fazl Bibi was exercising it when she executed the deed of 14th October 1887. But even if this deed could be assailed, we are of opinion that the daughters were entitled to succeed, both jointly and severally, under the father's will of 17th January 1880.

As to the plea that daughter's sons do not succeed their mothers, this is quite opposed to the spirit of Question 16, which clearly contemplates their succession as a matter of course, and only raises doubts as to whether, if the direct heirs of the daughters fail, the estate passes to their father's or their husband's collaterals.

We therefore think that the plaintiff's suit has been rightly dismissed by the Divisional Judge, and dismiss this appeal with costs.

Appeal dismissed.

No. 11.

THOMAS BECK,—(PLAINTIFF),—APPELLANT,

Versus

THOMAS SIDDLE,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 914 of 1890.

(RIVAZ & STODGON, JJ.)

Unregistered Association—Personal liability of Secretary of Managing Committee, who was also a Member thereof and a depositor in the Association.

B. guaranteed the honesty of his brother, who was appointed Manager of the Sind, Punjab and Delhi Railway Co-operative Stores, which was an unregistered private Association of the nature of a Club. B. further deposited Rs. 3,000 under the guarantee.

In a suit by B. against S., who was, at the time of the contract, a depositor in the Association, a Member of the Managing Committee and also its Secretary, for a refund of portion of his guarantee deposit, held that S. was personally liable, either as a sole promisor, or as a joint promisor (Section 43, Contract Act), and that a suit against him would lie.

Further appeal from the decrees of Colonel C. H. T. Marshall, Divisional Judge, Lahore, dated 5th May 1890.

Lee, for appellant.

Rattigan, for respondent.

The facts of this case and the points of law arising in connection therewith sufficiently appear from the judgment of the Chief Court which was delivered by

12th Feby. 1892. STODDON, J.—This was a suit brought by Mr. Thomas Beck, Fuel Inspector, North Western Railway, against Mr. Thomas Siddle, described in the plaint as Managing Director and Secretary of the North Western Railway Co-operative Association Stores, Limited, and formerly Managing Director and Secretary of the Sind, Punjab and Delhi Railway Co-operative Stores, for refund of a sum of Rs. 2,159-7-5, balance of a sum of Rs. 3,000 deposited by plaintiff with defendant as security for the due performance by plaintiff's brother, John Joseph Beck, of his duties as Manager of the Sind, Punjab and Delhi Railway Co-operative Stores.

From Rule I of the Bye-laws of the Stores in question, it appears that they were established for the purpose of supplying stores to Railway employes at cost price, and had not for their object the acquisition of gain for any of the members.

Rule III provides that, for the purpose of obtaining stores, deposits are made by the employes of the Sind, Punjab and Delhi Railway Company in such amounts and to such extent as may be required from time to time for the business of the Stores. Rule XII provides for the management being conducted by a Chairman, Vice-Chairman, Secretary and a Managing Committee. The powers of the Managing Committee are defined in Rule XXI, and among them is the power to appoint a Manager and fix the amount of security to be taken from him.

The Association was a private unregistered one of the nature of a Club.

In October 1884 a Manager was wanted. Mr. Siddle was at that time a depositor in the Association to the extent of one hundred shares of the value of Rs. 50 each. He was further a Member of the Managing Committee and Secretary to it. Mr. J. J. Beck was appointed Manager, and he entered on his duties on the 22nd October 1884. On the same date Mr.

Thomas Beck wrote the following letter, on a stamped paper of the value of Rs. 5, to the Secretary, Sind, Punjab and Delhi Railway Co-operative Stores, i. e., to Mr. Siddle, from a draft given to him by Mr. Siddle:—

"SIR,—I beg to hand you herewith Rs. 3,000 to be invested in my name in the Sind, Punjab and Delhi Railway Co-operative Stores, bearing interest at the rate of Rs. 6 per cent. per annum, and I have to ask that the usual debenture bond may be issued in my name.

"I do hereby also assign and mortgage the said debenture bond, No. 120, dated 22nd October 1884, for Rs. 3,000 to the Committee of the Sind, Punjab and Delhi Railway Co-operative Stores, for the due and faithful performance by my brother, John Joseph Beck, of the duties of Manager of the said Co-operative Stores, and for such time as Mr. J. J. Beck may continue to hold the appointment of Manager of the said Stores.

"I do further authorise the said Committee to recoup from the said deposit such losses as may be caused through fraud, dishonesty, or negligence of the said Mr. J. J. Beck, under the terms of his agreement with the said Stores, always provided that, subject to any prior claim the said Committee may have, the whole or residue of the said deposit of Rs. 3,000 shall on the termination of Mr. J. J. Beck's engagement as Manager of the said Stores be paid only to me, my heirs or assigns. Further, that all interest accruing on this deposit shall likewise be paid to me half-yearly, on the 1st July and 1st January of each year."

Subsequently, on the 24th February 1885, Mr. J. J. Beck entered into an agreement on a stamped paper of the value of Rs. 5 with the Sind, Punjab and Delhi Railway Co-operative Stores for the due performance of his duties as Manager. He resigned his post on the 10th or 11th February 1886. Shortly after his resignation, the Sind, Punjab and Delhi Railway was taken over by Government, and the Stores were taken over by an Association, which was registered on the 1st June 1886 under the style of the North Western Railway Co-operative Stores Association, Limited. The new Association took over the liabilities of the old one. Plaintiff pressed for the refund of the sum of Rs. 3,000 deposited by him as security, and eventually, on the 18th June 1886, Mr. Siddle, signing himself as

Managing Director of the North Western Railway Co-operative Stores, refunded to him a sum of Rs. 933-15-0, stating that the balance had been kept to make good discrepancies brought to light on stock-taking. The present suit, which was instituted on the 12th July 1886, was the result. Mr. Siddle defended it on the merits, and the record of evidence had been nearly completed, when his Counsel, Mr. Gouldsbury, who was apparently under the impression that his client was being sued as Secretary of the North Western Railway Co-operative Stores Association, Limited, objected to the frame of the suit on the ground :

- (a) that there was no privity of contract between the present Company and plaintiff ;
- (b) that even if there had been, the suit should have been brought against the Company and not against the Secretary.

To this, Mr. Bridges Lee, Counsel for plaintiff, replied that he was not suing the North Western Railway Co-operative Association Stores, Limited, nor the Sind, Punjab and Delhi Railway Co-operative Stores ; he was suing, as his plaintiff showed, Mr. Siddle personally.

On the 28th June 1887, the District Judge held that the plaintiff could proceed against Mr. Siddle alone as a joint promisor under Section 43 of the Indian Contract Act, and as a partner in the Association under Section 249 of the said Act. On the 19th January 1889, he passed a decree in plaintiff's favour for Rs. 2,159-7-0, from which Mr. Siddle appealed to the Divisional Judge, who found that no cause of action was disclosed against defendant individually as a member of a partnership, and that there was no privity of contract between plaintiff and defendant. He therefore dismissed the suit. Plaintiff has appealed to this Court.

It is clear that the Sind, Punjab and Delhi Railway Co-operative Stores was not a partnership of the nature defined in Section 239 of the Contract Act, because its first rule states that it has not for its object the acquisition of gain for any of its members. Defendant cannot, therefore, be held to be liable under Section 249 of the Contract Act ; but there does not appear to be any reason why he should not be held to be liable either as a sole promisor or as a joint promisor. By Rule XXI of the Rules, the Managing Committee had power to appoint a Manager and to fix the security to be taken from him. Plain-

tiff's contract of guarantee was with the Committee of the Sind, Punjab and Delhi Railway Co-operative Stores, and not with the general body of depositors. He pledged a debenture bond of the value of Rs. 3,000 to the Committee as security for the due performance by Mr. J. J. Beck of his duties as Manager.

The Committee had a lien on the deposit in question, and were entitled to make good out of it any losses caused by the Manager; but if there were no losses there was an implied promise by them to refund the sum of Rs. 3,000 to plaintiff. This is the construction to be put on the letter D. 1 containing the contract of guarantee; but as a matter of fact there is no evidence to show that any member of the Managing Committee, except Mr. Siddle, was a party to it, or knew anything about it. The learned Counsel for respondent contends that it is evident from the statement of facts that he was contracting as an agent of third parties, and that plaintiff knew that he was not pledging his own credit. Section 230 of the Contract Act is relied on as exonerating him from liability, and reference has been made to a recent decision of this Court published as *Punjab Record*, No. 15 of 1891, but there are very few points of similarity between that case and the present one. In my opinion, there is nothing whatever to show either that defendant was acting as an agent, or that plaintiff had reason to believe that he was acting as such.

The contract of guarantee was with the Committee which managed the Stores, and which would presumably have to decide whether the Manager should be called upon to make good any losses, and whether plaintiff's deposit should be refunded. There is nothing to show that he was informed that the Committee were acting as agents in the matter, or that they had no authority to refund the money without the consent of the members of the Association. They impliedly promised to return his money to him, which they probably held for their own security, and they must perform their promise, unless they can show that they are entitled to keep the money under the terms of the agreement. Defendant was one of the Members of the Managing Committee when the promise was made, and as a joint promisor he can, under the provisions of Section 43 of the Contract Act, be compelled to perform the whole of the promise. If, as is very possible, the other Members of the Managing Committee knew nothing about the promise, then defendant is liable as sole promisor.

The Divisional Judge states in his judgment that plaintiff assigned the bond to the Committee; and unless they re-assign it to defendant, he has no power whatever over it individually. There is no bond on the file, and it does not appear that plaintiff did anything more than give the Committee a lien on an ordinary deposit in the Stores, but the fact that plaintiff's money may not now be in defendant's power is quite immaterial. The only question is whether he has rendered himself personally liable to plaintiff; and I consider that it must be answered in the affirmative. Some reference has been made to Club law as enunciated in such Manuals as those of *Daly* and *Wertheimer*, but in reality it is little in point.

The case turns principally on the question whether defendant was a principal or an agent in the transaction. The facts show that he was a principal, or more probably one of several principals. If he was an agent, he did not disclose the name of his principal, and therefore there is a presumed contract of personal liability on his part.

The District Judge held that there was a variation between the terms of the contract of guarantee and those of the agreement entered into by Mr. J. J. Beck on the 24th February 1885, and that the surety was therefore discharged in regard to all the transactions subsequent to the variance. The Divisional Judge dissented from this view, and pointed out that there was but one contract in which J. J. Beck was principal, and the Stores Committee (he should have said the Sind, Punjab and Delhi Railway Co-operative Stores Association) the creditor, and that as that contract had never been varied, Section 133 of the Contract Act was inapplicable. In this he was clearly right. Plaintiff's contract of the 22nd October 1884 refers to the terms of Mr. J. J. Beck's agreement, and there cannot be any doubt that he knew that a formal agreement would be drawn up subsequently. There is nothing in it prejudicial to his interests.

I would accept this appeal on the ground that defendant is personally liable to plaintiff, and I would remand this case to the Divisional Judge for decision on the merits.

13th Feby. 1892.

RIVAZ, J.—I concur.

The stamp on this appeal will be refunded, and other costs will be costs in the cause.

Appeal allowed: cause remanded.

Full Bench.

No. 12.

SITA RAM & OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

RAJA RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 146 of 1890.

(ROE, FRIZELLE & RIVAZ, JJ.)

Custom—Agriculturists—Customary adoption of the Punjab—Succession of collateral heirs in his natural family of person adopted, in default of lineal descendants.

Held, by the Full Bench, that there is no general custom prevalent amongst agriculturists in the Punjab by which the collateral heirs, in his natural family, of a man who has been adopted under a customary adoption, succeed, in default of his lineal heirs, to the property which he acquired or inherited by virtue of his adoption.

Not only is there no such general custom, but such a succession is quite opposed to the general principles which regulate the succession to land in the village communities of the Punjab.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 9th January 1890.

Lal Chand, for appellants.

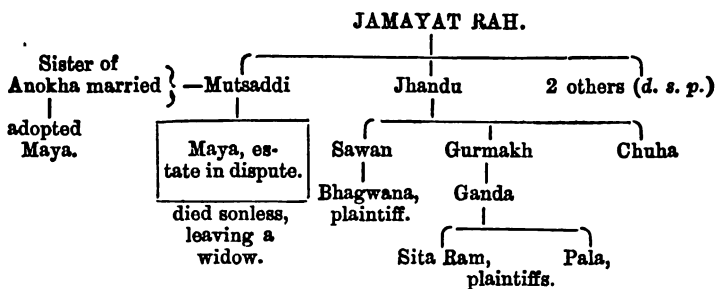
Rattigan, for respondent.

This was a reference to a Full Bench for the purpose of considering the question whether there is any general custom prevalent in the Punjab by which the collateral heirs, in the natural family, of a man who has been adopted under a customary adoption, succeed, in default of his lineal heirs, to the property which he acquired, or inherited, by virtue of his adoption.

In January 1889 the case came before a Division Bench of the Court (Powell and Frizelle, JJ.) upon appeal from a decree of Colonel H. J. Lawrence, and was remanded, under Section 562, Civil Procedure Code, for redecision by the following judgment which was delivered by

POWELL, J. (FRIZELLE, J., concurring).—We think the 18th Jany. 1889. judgment of the Divisional Judge cannot be sustained, and as it has proceeded purely on a preliminary point, which has excluded from consideration the rest of the case, the remand we are about to make must be under Section 562, Civil Procedure Code.

The parties are (Kalia) Brahmins of the Jullundur District. The relationship is this :



The late Maya obtained the estate in dispute from Anokha, who was his maternal uncle : this point is not in dispute. The question is, who are the reversionary heirs to Maya as regards this estate ? Maya's widow has assumed to make a gift, depriving the heirs of the whole or a part of the estate, and the plaintiffs, claiming as reversioners, object to the gift.

There is of course the further question whether, among Brahmins of this *gôt* in the Jullundur District, there is any exceptional power residing in widows to alienate, and this question may of course require to be disposed of by the Divisional Judge. But the primary question is about the adoption and its consequences, as determining who are the reversioners.

On the table of relationship above stated, it is quite plain that if Anokha really adopted Maya formally, in such a way as to perfect the legal fiction of Maya's complete transfer out of his own natural family and into Anokha's, then it might be held that Anokha's collaterals were Maya's heirs, Maya being for all intents and purposes Anokha's son.

Ordinarily, also, it would be true that if Anokha only *informally* adopted Maya, without ceremonies and in such a way as agriculturists often "appoint an heir" in this Province, and if Maya still continued a member of Mutsaddi's (his own father's) family and received his share of Mutsaddi's land, then it would be reasonable to hold that Maya, though informally adopted by Anokha, did not cease to be a member of his own natural family, and therefore his own cousins and collaterals could succeed him. But unfortunately the case cannot stop here, for there are a number of cases in this Court in which it has been questioned, and an issue as to custom raised, whether, even if the adoption is informal and the adopted son does not leave his own family completely, the adoptive father's estate is

not transferred to the adopted in some limited manner, *i. e.*, on the understanding that, failing sons and direct descendants to the adopted, the land shall *revert* to the adopter's or donor's family, and not pass to that of the adopted. Such an issue was sent down in *Punjab Record* No. 45 of 1884; (see also Nos. 146 of 1884, and 82 of 1885).

Neither Court has noticed this. The first Court says, in effect, Maya was not adopted: he only got a *gift* from Anokha, and it *assumes* that, being a gift, Maya's personal heirs must succeed, and not the donor's family. The Divisional Judge, on the other hand, finding that Maya *was* Anokha's adopted son, assumes that, therefore, the heirs of Anokha are the collaterals entitled to sue, and not plaintiffs, the heirs of Maya. Neither assumption can be supported without an opportunity to the parties to prove (if they can) their custom.

The Divisional Judge should decide: If Maya was really adopted, was it a formal adoption involving *all* the consequences of a *complete transplanting* of Maya from his own family to Anokha's? Or if it was an informal adoption, what were its effects? Is there any custom that on the failure of direct heirs to such an adopted son, the property reverts to the donor's family?

If there is such a custom, Anokha's heirs will surely be able to quote instances of such reversion.

And then when the Divisional Court has come to a conclusion as to the effect of Anokha's connection—of whatever sort it may be—with Maya, and has thus determined whether the plaintiffs are entitled to stand as reversioners or not, he will still have to go into the question (if he find for the plaintiffs) whether there was any special rule that the widow can alienate. Such a special rule will be the exception to the general rule, and therefore, clearly, the defendant would have to prove it. The stamp will be refunded, and the costs of this Court will follow the result.

The Divisional Judge (Mr. T. Troward) again decided adversely to the plaintiffs, who now preferred a further appeal to the Chief Court from this decree, which was referred for consideration to a Full Bench. The Division Bench (Benton & Stogdon, JJ.) recorded the following opinions:

STODDON, J.—The facts of this case are stated in the 6th Decr. 1891. judgment of this Court, dated 18th January 1889, remanding

it under Section 562, Civil Procedure Code, to the Divisional Judge for decision of the following points, *viz.* :—

If Maya was really adopted, was it a formal adoption involving all the consequences of a complete transplanting of Maya from his own family to Anokha's? Or if it was an informal adoption, what were its effects? Is there any custom that, on the failure of direct heirs to such an adopted son, the property reverts to the donor's (should be adopter's) family?

The Divisional Judge has now found that Maya was adopted by Anokha, but the adoption was not of such a nature as to involve the complete transfer of Maya from his own family to that of Anokha. No instances having been proved by either party as to what is the custom of inheritance in such a case, he considered that *Punjab Record*, No. 147 of 1889, was a sufficient precedent for saying that the estate derived from the adoptive father would revert to his family. He therefore accepted the appeal and dismissed plaintiffs' suit. They have again appealed to this Court. Their learned Pleader contends that there was a mere handing over of the property by Anokha to his sister's son, Maya. There was no adoption at all. If there was one, it was a customary one of the loosest kind. The act of Anokha was rather one of alienation, which the heirs for the time being did not care to contest. The heirs of Maya, the last male owner, are *primâ facie* entitled to the reversion and the collaterals of Anokha have no right to sue. He further contends that *Punjab Record*, No. 147 of 1889, is not in point, and urges that this Court should follow *Punjab Record*, No. 89 of 1885.

On the other hand, it was contended that Maya was validly adopted by Anokha, and that he was at least a *Dwyamushy-ayana*, or son of two fathers, and that, as no custom regarding inheritance had been proved, Hindu law must be followed as was done in the two cases reported as *Punjab Record*, No. 147 of 1889 and No. 21 of 1890.

After perusal of the evidence, I am of opinion that there cannot be any reasonable doubt that Anokha adopted Maya. The adoption appears to have been a customary Punjab adoption of an informal nature. Anokha took Maya before the Sikh kardar, Bawa Gopal Singh, at Dakhni, and stated that he was his son and heir. This fact was stated by some of the witnesses from the very first. The subsequent evidence that Maya gave the Bawa a *nazar* of one rupee and that the Bawa invested him with a turban, and that Anokha on return to Khewa feasted Brahmans, is probably false; but there cannot be much doubt of

the main fact, that Maya was brought up by Anokha and constituted his heir. Maya having died sonless, the question is whether the property which he inherited from Anokha reverts to Anokha's collaterals, or whether it passes to Maya's blood relatives. The learned Judges who passed the former judgment of this Court appear to have considered that the burden of proving their right was on Anokha's heirs; but the Divisional Judge considered, on the authority of *Punjab Record*, No. 147 of 1889, that it was on Maya's blood relatives, and as no evidence regarding custom was forthcoming, he dismissed their suit. In this I think he was right. The informal Punjab adoption involves something more than a mere appointment of an heir or of an indication of an intention on the part of a sonless proprietor that a certain person shall succeed to his property. It certainly involves an idea of sonship, though it may not be considered that the adopted son has been completely transferred from his own family to that of the adopter. Under such circumstances, I see no reason whatever why the adoptee should not be regarded as a son of two fathers, a status well known to Hindu law; and it seems to me recognised by Punjab custom. I would therefore follow the rulings of this Court published as *Punjab Record*, No. 147 of 1889 and No. 21 of 1890, and dismiss this appeal with costs.

BENTON, J.—I am unable at present to concur in the result arrived at by my learned colleague, following previous rulings of the Court, *Punjab Record*, Nos. 147 of 1889 and 21 of 1890. I entirely concur with his finding as to the manner in which Maya's adoption by his maternal uncle Anokha was accomplished. The parties are Brahman agriculturists and petty traders, but there is no good reason on the evidence for supposing that any special ceremonies were performed, or that the adoption was different from, or intended to be different from, the adoption usually practised in the Punjab. I am unable to accept the contention of the learned Counsel for the appellants, that the evidence establishes that all the ceremonies prescribed by strict Hindu law were performed, or should be presumed to have been performed, under the circumstances. He also endeavoured to show that, according to strict Hindu law, the ceremony of *Datta homam* is unnecessary to effect a formal adoption, and also that

I. L. R.	9, Mad.	148.	age is a matter of no consequence
"	11 "	5.	
"	6 All.	276.	so that this was a proper formal
"	10 Bom.	80,	adoption, whatever the facts might be.

With this object the cases in the margin were cited.

The first three rulings go to show that, according to the view taken by two of the High Courts (Allahabad and Madras), this particular ceremony is not necessary to effect a valid adoption in the case of Brahmans belonging to Madras. The last ruling goes to show that in Bombay a Brahman who is married and has had children may be validly adopted. It must be remembered that this is an adoption by a Brahman of a sister's son and if there were any question of the validity of this adoption regarded as one under Hindu law, we should have to test it, not by reference to the laws and customs of Madras or Bombay, but with reference to the Hindu law applicable to the Punjab. This being a case of Brahmans, it appears from paras. 141, 142 and 143 of Mayne's Treatise, and the authorities there quoted, that due attention to the prescribed ceremonies was essential to effect a valid adoption. The author of the Tagore Law Lectures for 1888 seeks to minimise the importance of ceremonies, yet he nevertheless, at page 382, admits that there is a catena of authorities in which the performance of religious ceremonies is stated to be an essential element in an adoption of the twice born classes; so also the adoption of a sister's son amongst Brahmans could not be maintained in accordance with the authorities cited in Jolly's History of Hindu Law, page 162, and Siromani's Commentary on Hindu Law, page 125. Nevertheless, I do not for a moment say that this adoption is not as valid as if all the ceremonies prescribed had been strictly performed, and, as it would have been, had there been no relationship whatever between the parties to it, nor do I think that the performance or non-performance of these ceremonies should in any way alter its effects. I say so with all deference to any authorities there may be to the contrary. There are several misconceptions with regard to the institution of adoption in this Province according to my view of the matter, which it would be a great advantage to have cleared away. We were told in argument by the learned Counsel for the appellants that an adoption in the Punjab was merely the appointment of an heir. I am glad to find myself in accord with my learned colleague on this point, when he says: "It certainly involves an idea of sonship, though it may not be considered that the adopted son has been completely transferred from his own family to that of the adopter." If the mere appointment of an heir were the whole matter, a declaration or a deed of adoption would be sufficient to effect a valid

adoption, but so far as judicial authority goes, this is not the case. I may refer to *Punjab Record* No. 36 of 1884, *Punjab Record* No. 72 of 1882, and unpublished appeal No. 720 of 1890.

I would maintain that the institution of adoption in this Province is an institution of exactly the same character as that which passes under the same name in other Provinces, and that it should be treated with similar consideration, although its exact features may vary among different classes and in different localities, and although they may not have been elucidated by a long list of learned commentators. It seems to be out of the question that there should be different forms of the same institution among the same people, differentiated by the fact that particular ceremonies were and were not had recourse to. I would urge that, if in any particular instance any incident be doubtful, we should presume that the prevailing rule for the Province is applicable, and that we should not rush away to a form of the institution prevailing in other Provinces and borrow from the latter a rule to apply. This proceeding appears to me very unphilosophical and likely to lead to much confusion. I am glad that the method of treating this matter I am now advocating is no notion of my own, and that it has been insisted on in dealing with an adoption case reported as *Punjab Record*, No. 43 of 1879. I do not think that the course I wish disapproved of is justified by Section 5 of the Punjab Laws Act.

In the argument in the present case, we inquired of the learned Counsel for the appellant, when it was ascertained that the adopted son had succeeded to his father's property, whether the plaintiffs would have been entitled to succeed to that property had it been still in existence. He did not say they would, but candidly admitted that there was no rule providing for the matter, and expressed an opinion that it would be equitable that his natural heirs should succeed to that portion of the estate. This was, in fact, what *Punjab Record*, No. 147 of 1889 decided should take place. This result is somewhat startling, as judicial decision is thus made to enforce a new scheme of succession hitherto unheard of. Over and above, it makes no provision for self-acquired property by the adopted son, whether it shall go in the one family or in the other.

The position of the son of two fathers (*Dwyamushyayana*) as regards the two families with which he is connected is not clearly determined in any of the Hindu law books. The adoption in the *Kritrima* form is of this (*Dwyamushyayana*) type, and

the position of the adopted son is clearly enough defined. He inherits his natural father's estate and retains his position in his own family, so that he would succeed to collaterals ; and as regards the adopted father, he succeeds to him, but not to collateral relations. Our Punjab adoption, so far as ascertained, generally corresponds. As regards adoption of a *Dwyamushyayana* in the *Dattaka* form, I conceive that it would be the converse of this. The adopted son would succeed to his adopted father and adopted collateral relations, but he would succeed his own natural father alone in his natural family. His position in the adopted family is according to the general rule, and the exception is his succession to his own natural father, which is necessary for religious purposes. The exception should not be extended further than the necessity demands. There is nothing unworkable in either scheme as thus set forth. We must remember that in any workable scheme of succession the principle of mutuality must be observed, that is to say, if it be laid down by any rule that any member of a family in a pedigree table, say A, succeeds to another member, B, then B must also be allowed to succeed to A. It follows that a man may succeed to two fathers at once, but he cannot at one time be a member of two families and succeed in both, because a conflict immediately arises between the members of the two families when the adopted son dies without heirs and there is no deciding between them. We must either adopt the one scheme or the other if we wish to avoid a rule that cannot be always applied, and in adopting either we should not be travelling away from authority and analogous systems. The scheme into which the ruling which my learned colleague would give in this case has this most serious defect. I was not aware of it when I sat as a member of the Bench which is responsible for *Punjab Record* No. 21 of 1890. There was nothing in that case, such as there is in the present, to make one feel the exceeding incongruity of attempting to apply a rule of Hindu law to an adoption which Hindu law, for many reasons, could not recognise ; and that is my excuse for not having put forward these views on the previous occasion.

It is to be regretted that, when the case was remanded by this Court on the previous occasion, the attention of the lower Court was chiefly directed to ascertaining whether certain ceremonies had been performed. I do not say that the performance of ceremonies is absolutely devoid of importance even in this Province. If we found parties carefully performing the

ceremonies prescribed for an adoption by Hindu law, there would be a presumption that the consequences of that adoption were in accordance with the custom of the family regulated by strict Hindu law. The Privy Council drew a similar conclusion with regard to a family migrating from the territory governed by the *Mitakshara* in Bengal to that governed by the *Dayabhaga*, from its retaining the services of a *Mitakshara purohit* in *Ratcheepetty Dutt Iha v. Rajindar Narain Roy* (II Sutherland's P. C. Judgments, 1.), but I may observe the conclusion does not follow of necessity. It would have been very much preferable if the lower Court had been directed to ascertain whether, in cases of adoption amongst these Brahmans, there were any instances of the adopted son succeeding to collaterals in either family, or of collaterals on either side succeeding to him. Instances of either sort would have determined the question in accordance with the principle of mutuality, which I have above endeavoured to explain. Adoptions are not infrequent. There must be a rule on the subject, and it would, I believe, be quite easy to discover it, if the method I recommend be a correct one. However, I dislike repeated remands, and I do not propose another remand in the present case as I do not think that it is absolutely necessary.

I think that this case should have been decided in the same way as *Punjab Record* No. 42 of 1886 was decided, which was a case of agricultural Brahmans of the Hoshiarpur District and of an ordinary Punjab adoption. It appears to have been decided in favour of the natural collaterals merely on the ground that the adoption was of the customary sort, and the decision is said to be in accordance with a long course of decisions of this Court. This is the fact. I have read most of the decisions reported, and I find they all, with a very few exceptions, in which a different rule was established by evidence, follow the principles enunciated in *Punjab Record* No. 43 of 1879, and that the only decisions on the other side are those later ones followed by my learned colleague, *viz.*, *Punjab Record* No. 147 of 1889 and *Punjab Record* No. 21 of 1890. I would, therefore, propose that there should be a reference to a Full Bench on the following point: Whether, in the case of an adoption in families of Brahman agriculturists or petty traders of the Jullundur District which has been ascertained to be of the type customary in the Province, when the adopted son has died childless and there is a contest between the natural heirs of the

adopted son and the collaterals of the adopted father with regard to the estate which the adopted son inherited from the adoptive father, and no rule of custom has been established, what is the proper rule to apply for decision of the question? Should we apply the prevalent rule in the case of Punjab adoptions in favour of the natural heirs; or should we have recourse to Hindu law, and apply the rule applicable to adoptions under Hindu law in favour of the collaterals of the adoptive father?

12th Decr. 1891. STODDON, J.—I agree to the proposed reference to a Full Bench.

The opinion of the Court was delivered as follows—

29th Jany. 1892. ROE, J. (FRIZELLE & RIVAZ, JJ., concurring).—The form in which the reference has been made does not appear to us to embody the real question on which the learned Judges referring the case are at issue or in doubt. It is found that the parties are not governed by any special custom of their own. It is therefore clear that, if there is not what is called a general custom of the Punjab applicable to the case, the parties must be governed by Hindu law. The formal answer to be made to the reference would be that, if it is found that there is a general custom of the Punjab prescribing a rule of succession in cases like the present, the parties would be governed by it rather than by Hindu law. It is, however, perfectly clear to us that the question we are really asked to decide is one which is stated as an assumption in the order of reference, *viz.*, whether there is any general custom prevalent amongst agriculturists in the Punjab by which the collateral heirs in the natural family of a man who has been adopted under a customary adoption, succeed, in default of his lineal heirs, to the property which he acquired or inherited, by virtue of his adoption?

The pleader for appellants states that he is not prepared to argue the reference, if stated in this form. We think, however, that it is perfectly clear from the judgments proposed, or opinions recorded by the referring Judges, that this is the question to which they desire an answer, and that counsel on both sides should have been prepared to argue it. We must therefore call on the pleader for the appellants to do so. He proceeds to do so accordingly, and after hearing argument on both sides we reserve judgment.

6th Feby. 1892. ROE, J. (FRIZELLE and RIVAZ, JJ., concurring).—I think that the answer to be given to the reference, in the form in which

we have stated it, should be considered (1) with reference to the previous decisions of this Court; (2) with reference to the general principles which govern the customs regulating succession to land in Punjab village communities.

As regards decided cases, it is observed in *Punjab Record* No. 21 of 1890 that "the result to be deduced from published authorities would appear to be that, at all events amongst Jats of this Province, the more usual rule is that the estate passes to the natural heirs of the adopted son." *Punjab Record* No. 9 of 1880, No. 89 of 1885, and an unpublished case, No. 1235 of 1886, are quoted in support of the remark, and other cases are also referred to as showing that a similar rule has been generally held to apply to the succession to estates left by daughters' sons or daughters' husbands who have left no lineal male heirs.

In *Punjab Record* No. 9 of 1880 the land then in dispute had originally belonged to one Dal Singh, a Bhular Jat of the Lahore District. He died sonless, but leaving two daughters and a stepson, Amir Singh, who was allowed to succeed him, on what title it was not clear, but apparently as an adopted son, for Amir Singh called himself henceforth a Bhular Jat (he was by birth a Man Jat), and his succession was accepted by Dal Singh's collaterals. He in turn was sonless, and he adopted Sawan Singh, the son of one of Dal Singh's daughters, who had married a Manhes Jat. On Sawan Singh's death without issue, his estate was taken by the male collaterals of Dal Singh (who, however, claimed as heirs male of Amir Singh), and was claimed by Sawan Singh's brothers' sons, who were also through his daughter, great-grandsons of Dal Singh. Their claim was allowed because, no custom on the point being proved, it was held (1) by Lindsay, J., that the adoption, which had been found to have been an informal customary adoption, must be held to be an adoption in the *Kritrima* form, the effect of which was to create a purely personal tie between the adoptive father and the adopted son: (2) by Smyth, J., because, as the informal customary adoption only created a personal tie giving the adopted son no right to succeed collaterally in his adoptive father's family (*Punjab Record*, No. 97 of 1879) and not depriving him of any right to succeed in the family of his natural father (*Punjab Record*, No. 43 of 1879), the land received by the adopted son must be held to have been taken by him as a gift absolutely, and as in

the case of sonless *khanah damads* (*Punjab Record* No. 122 of 1879) the heirs must be looked for in the natural family of the last holder of the estate.

In *Punjab Record* No. 89 of 1885 the adopted son was a nephew (brother's son). The succession was claimed by two brothers of his adoptive father, against his own brother (i.e., son of the third brother of the adoptive father, who was admittedly entitled to one-third of the estate). It was again found that no custom was proved, and in the absence of custom. *Punjab Record* No. 9 of 1880 was followed, and the succession awarded to the brother. The parties were Jats of the Lahore District, tribe not stated.

In No. 1235 of 1886, the parties to which were apparently Jats of Amritsar, tribe not stated, the facts were much the same as in *Punjab Record* No. 9 of 1880. The adopted son was also a daughter's son, who had been succeeded by a son who had died childless; the estate had been taken by his uncles, i.e., other daughter's sons of the adopter. It was again found that the adoption was the customary informal one, and that no custom as to the rule of succession was proved. *Punjab Record* No. 9 of 1880 was followed by the learned Judges, who decided the case (*Rattigan and Frizelle, JJ.*), but the remarks of the learned Senior Judge who admitted the appeal to a Bench (Sir Meredyth Plowden) certainly pointed to a different conclusion. He observed: "I entertain a strong opinion that, according to general popular sentiment, the verdict would be in favour of the plaintiffs (the male collaterals of the original adopter). I have lately sent a case to a Bench in which the question arose as to succession when the married daughter and her husband have received land from her father and have died childless. The deeper we go into *khanah damad* cases, the more apparent it is that all the *khanah damad* takes is in right of his wife, and, as a conduit, to let in the daughter's children, and thus the true intention, in all these cases of daughters' offspring, is to benefit the direct descendants of the old stock (although through females), and not, on the failure of heirs, to benefit the family of the husband. The same applies to the appointed heir. *Punjab Record* No. 9 of 1880 is a very peculiar case, and will rarely form a real precedent. *Punjab Record* No. 9 of 1885 follows it, and little more can be said."

The case just referred to (*Punjab Record* No. 9 of 1885) was one in which the plaintiffs were Bhular Jats of the Lahore District. A village had been founded by two Bhular Jats, Sudh Singh and Budh Singh. One Godh Singh had married their sister, and had received two-thirds of the village as a gift. He was succeeded by his son Bulaka Singh, who *o. s. p.* His estate was claimed by the male representatives of Budh Singh and Sudh Singh against the male collaterals of Godh Singh. A remand was made by this Court for a full inquiry on this issue:—Is there a custom amongst Bhular and Punu Jats, or amongst Jats generally in the Kasur tahsil and its neighbourhood, under which, on a gift of land to sisters or daughters or sisters' or daughters' husbands, and on failure of male issue of the donees, the property reverts to the heirs of the donors, and does not descend to the heirs of the donees?

The return was a finding by the Additional Commissioner that there was such a custom; it was recorded in the *Riwaj-i-am*; it was attested by the opinion of the leading men of the tribe; and there were two judicial decisions which supported it. The Court, however, held that the *Riwaj-i-am* was not entitled to much weight, as there were no instances given to illustrate the entry, and there was no reference to the custom in the old *Wajib-ul-arz*. The opinion of the leading men was also treated as of little value, because it was unsupported by instances. And the two judicial decisions were held to be merely echoes of the *Riwaj-i-am*. It was therefore held that plaintiffs had failed to prove a custom in their favour excluding the natural heirs of the donees.

The other cases referred to in *Punjab Record* No. 21 of 1890 are *Punjab Record* No. 122 of 1879, No. 53 of 1882, No. 163 of 1882, No. 146 of 1884, No. 9 of 1885, No. 82 of 1885 and No. 1 of 1886.

In No. 122 of 1879, the parties in which belonged to the Ludhiana District (their tribe is not stated), there was a gift to a daughter and her husband, and they were succeeded by their son, who *o. s. p.* His estate was claimed by (1) the collaterals of the husband; (2) the collaterals of the donor.

The issue framed by the Additional Commissioner for inquiry on remand was: Does the land lapse to the family of the giver if the son-in-law dies without lineal descendants? The return was a finding by the lower Court, based on reports of the Tahsildars, to whom commissions for local inquiry had

been issued, and an examination of the instances of succession which had actually occurred, that the custom *was* established. The Additional Commissioner, however, held that the instances failed to prove the existence of a custom by which the natural heirs of the *khanah damad* would not succeed to the land, and this finding was accepted by this Court in a judgment of a few lines only.

In *Punjab Record* No. 53 of 1882 (the parties belonged to the Umballa District, tribe not stated) there had been a gift to a daughter's son, who *o. s. p.* His widow alienated the land, and the collaterals of the original donor sued to restrain her. It was held that they had failed to prove a custom by which the land would revert to them, to the exclusion of the natural heirs of the daughter's son, and that therefore they had no *locus standi*. Some inquiry was apparently made as to custom by the Naib-Tahsildar. No detail of the evidence taken is given, but the result is said to have been unfavourable to the plaintiffs.

In *Punjab Record* No. 163 of 1882 in which the parties were Chunda Jats of the Jagraon Tahsil of the Ludhiana District, a brother had gifted land to his sister, and she was succeeded by her son. On his death *s. p.* the estate was claimed (1) by the donor's collaterals; (2) by the deceased's half brother, *i. e.*, a son of the sister's husband by another wife. The lower Court decided, basing its decision on what it found by local inquiry to be a general consensus of opinion as to what was the proper rule of succession, in favour of the collaterals of the donor. This Court held that, as there were no well proved instances to support the opinion as to custom—most of the witnesses stating that no such case had hitherto occurred—the custom in favour of the right of the donor's family to succeed was not proved.

In *Punjab Record* No. 146 of 1884 the parties were Muham-madan Jats of the Gujrat tahsil; an issue was framed by this Court for further inquiry on remand whether, "in cases where land has been gifted to a daughter's son, do the heirs of the donor, or the heirs of the donee, succeed?" This Court held, concurring with the lower Courts, that plaintiffs had failed to discharge the onus of proving that they, as heirs of the donor, had a right to succeed. No detail is given of the evidence, but it is said that the *Rivaj-i-am* does not provide for such a case. *Punjab Record* Nos. 53 and 163 of 1882 are cited as precedents for this judgment.

In *Punjab Record* No. 82 of 1885, the parties in which were Bhats of Sonepat in the Delhi District, there had been a gift to, or an adoption of, a daughter's husband. This Court found after an inquiry on remand, that no analogous case had ever occurred in the parties' brotherhood, and that the plaintiffs had failed to prove any special custom by which they, as heirs of the donor, were entitled to succeed to the exclusion of the heirs of the donee.

In *Punjab Record* No. 1 of 1886, the parties in which were Muhammadan Jats—Varaitchs of the Phalian Tahsil of Gujrat—there had been a gift to a son-in-law. On the failure of his lineal descendants, the estate was claimed against his collaterals by the collaterals (second consins) of the donor. The lower Courts found in favour of the claim of the collaterals of the donor, basing their decision on paragraph 13 of the *Riwaj-i-am*, and six instances given in support of it. This Court held that two of these instances were not proved, that two were doubtful, and that two had occurred in the time of the Sikhs and could not be trusted as precedents. The learned Judges (Tremlett and Smyth, JJ.) were of opinion that the published cases of this Court noted in the margin of their judgment, which are the cases which have just been examined, were sufficient authority for holding that the succession passed to the heirs of the donee, unless the heirs of the donor could prove a special custom by which it passed to them.

It appears to me quite clear that the above decisions do not show that there is any general custom amongst Jats in the Punjab in favour of the succession of the collateral of a person who has been adopted by an informal customary adoption, or who has received a gift as a daughter's husband or a daughter's son, to succeed, in default of the lineal heirs of the adopted son, or donee, to the exclusion of the collaterals of the person from whom the adopted son or donee derived his title. In no case has it been found that their right has been proved affirmatively by an examination of numerous instances of actual succession. On the contrary, where custom has been most fully inquired into, the findings of the lower Courts have been against the supposed right, and these findings have been overruled by this Court on the ground that entries in the *Riwaj-i-am* and a general consensus of opinion are, in the absence of sufficiently numerous instances of actual succession, insufficient to rebut the presumption which the Court has held to exist in favour of the succession of heirs of the adopted son, or donee.

The question then arises, has the Court been right in making this presumption? I think it most certainly has not. The ground on which it was originally made, in *Punjab Record* No. 9 of 1880, was that, as the customary adoption or appointment of heir created only a personal tie between the parties concerned, and involved no transplanting of a person from one family to another, therefore it must be assumed, until the contrary is proved, that the heirs of the person who last held the estate are his natural heirs. This is the principle which has been followed in all the cases which have been examined. And it might be a perfectly correct principle if the estate consisted of a property over which the donor, or adoptive father, had an absolute power of disposal. Where, I think, the published decisions, go wrong is that they one and all fail to consider the *nature* of the property in dispute. A similar failure led to wrong principles being applied to the decision of cases in which a sonless proprietor's power of alienation was in dispute. This last mistake was corrected by the Full Bench ruling of this Court in *Punjab Record* No. 107 of 1887, and I think that the principles therein laid down afford us the proper guide for the decision of the class of cases now before us. The whole principle underlying the enjoyment of, and succession to, land in villages held by a body of proprietors belonging to one tribe, or descended from a common ancestor, is that the land does *not* belong absolutely to the individual holder for the time being—it belongs to the family, or community. Where this is the case, it is only natural to presume that, as the power of the holder for the time being to alienate the land during his life is restricted, so also will be his power of altering the rule of succession. It is indeed this power of altering the succession which is restricted, for the power of a proprietor to alienate his undoubted right, i. e., the right to enjoy the profits of the land for his life, would hardly be disputed. We find that in some tribes, custom, at any rate as declared in the *Biwaj-i-am*, allows no alteration of the strict rule of succession at all; it will not allow even the adoption of, or a gift to, a *yak-iaddi*. Other tribes allow such adoptions, or gifts, but no others. Other tribes go further, and allow gifts to, or adoption of, certain males closely connected with them in the female line such as daughters' sons or husbands' or even sisters' sons. But I entirely concur with the remarks of Sir Meredyth Plowden, which I have already quoted, that where this is done it is done

from a tender feeling to benefit the direct descendants of the old stock, and not in order to benefit the family into which a daughter of the tribe happens to have married. When the tribe or village community thus breaks its rule of rigid exclusiveness, it certainly never contemplates the admission into its body of a stream of unknown strangers. I feel certain that, to an ordinary Jat tribe, the idea of the right of the collaterals of a daughter's husband to enter the daughter's father's village, and take his share of the tribal or family land, would be regarded as quite as preposterous as a similar claim on the part of the father's collaterals to succeed to land in the husband's village. It also appears to me that these ideas or feelings, which, as already noted, have been found in several inquiries to exist in fact, in favour of the heirs of the donor or adopter, should not be lightly set aside as mere sentiment. It must be remembered that the persons examined in these inquiries as to custom are uneducated men, and when asked the reason for their opinions they can give none; they can only repeat that it is the custom. Were they educated men, they would be able to give ample reasons. They would trace the history of the property in dispute, showing how it had been acquired, and how it had descended to its last holder: they would show that it had never been the absolute property of any individual, but formed part of a large estate, which, though subdivided, either temporarily or permanently for the purposes of enjoyment of profits, was ultimately the property of a community, whose only known law was custom, which custom was based, not on caprice, but on perfectly intelligible principles, having for their object the maintenance of the integrity of the community. They would thus explain that, when any question arose for the solution of which there were no actual precedents, they were still able to deduce logically from the broad general principles which governed the community, the manner in which the new question should be solved, and they would maintain that the right of the collaterals of the donor, or adopter, to succeed was a logical deduction from these principles.

Such an answer seems to be not only a perfectly reasonable one, but the only reasonable answer. If the learned Judges who dealt with *Punjab Record* No. 9 of 1880 were asked on what ground *they* decided that there was any natural presumption in favour of the natural heirs of the donee, or adopted son, they would have replied that, according to their ideas, founded

on their experience of the manner in which property is in fact held in most civilised communities, the holder of an estate is an absolute owner, with an unrestricted power of alienation, and when he, by any act to take effect either during his lifetime, or at his death, transfers the estate to another person, it follows that this person in turn becomes an absolute owner, and, unless he himself makes a similar transfer of the estate, it will pass on his death to his natural heirs. Had the true nature of the property been pointed out to the learned Judges, and had they considered this, as was done in *Punjab Record* No. 107 of 1887, they would no doubt have found that the last holder of the estate was not an absolute owner, that he held it subject to the reversionary rights of the community, and that, on failure of direct heirs, the heirs would be the members of the community who stood next in succession.

The general principle which regulates succession to ancestral land in a Punjab village community is fully explained in the Full Bench case No. 4, *Punjab Record* of 1891. It is there shown that the property of a man who dies without issue first reverts to the ancestor, and then descends to the male lineal descendants of that ancestor. Thus a brother succeeds a sonless brother, not as a brother, but because the estate reverts to the father and descends again to his sons. So, too, a mother succeeds, not as a mother, but as the widow of the father to whom the estate has ascended. This also explains what is called "the principle of representation." Applying this rule to the case of adopted sons, or donees, who have left no lineal heirs, it is clear that the estate would be treated as ascending to the person from whom the adopted son or donee derived his title: if, as would almost invariably be the case, that person left no male lineal descendants, the estate would ascend still higher in his line, until an ancestor was found, who had held the estate, and had left descendants. I think that there can be no doubt that the principle laid down in No. 4 of 1891 is the true principle of succession, and under it the persons called, in the cases before us, the collaterals of the donor or adopter have an undoubted right to succeed in preference to the collaterals of the donee, or adopted son, who have really no right of succession at all.

It was remarked in *Punjab Record* No. 9 of 1880, and indeed this formed one of the grounds of the decision, that a person adopted in the customary Punjab manner acquired no right of collateral succession in his new family, nor did he lose his rights

in his old family. I am by no means prepared to say that this is the universal rule. I think that a fuller inquiry would show that the practice of the Jat tribes varies greatly, and that some tribes do treat an adoption as transplanting the person adopted from one tribe or family to another. Thus, in No. 9 of 1880, Amir Singh, who was originally a Man Jat, became after his adoption a Bhular Jat. It is also frequently put forward as an argument that an alleged adoption did not, in fact, take place, that the person said to have been adopted had succeeded to his natural father's estate, or that he continued to belong to his old tribe. But I do not think the question of a right of collateral succession in the new family, or of retaining rights in the natural family, really affects the point now before us, *viz.*, who, in default of lineal heirs, are the heirs of the adopted son? It appears to me clear that, although, if such a son has been incorporated into the new tribe or family, the right of the members of that family to succeed him would be still further beyond dispute, the fact that he has not been so incorporated cannot possibly give his own collaterals a right to enter the new tribe and hold part of its land. It has been noticed as a difficulty by the learned Judge making the present reference, that in cases where an adopted son has taken the estate both of his adoptive and his natural father, he would, if the rule of succession, which I believe to be the correct one, were followed, have, on failure of lineal descendants, two sets of heirs. I see no difficulty in this. I think he would certainly have two sets. If there were no blood relations at all, either of himself or of the adoptive father, it is clear that the two estates he held would pass into the *shamilat* of their respective villages, that is, they would be taken by two separate sets of heirs, the proprietary body of the two villages. The existence in either village of intermediate heirs does not appear to me either an anomaly or a difficulty.

It is unnecessary to discuss what would be the rule of succession under Hindu law. *Punjab Record* No. 147 of 1889 might be referred to on this point; but I think it is one which has little bearing on the class of cases before us. What might be excellent law, when the estate to which succession is claimed consists of a fortune in Government securities, may be very bad law when the estate is a holding in a village community. The question before us is, whether there is any general custom prevalent amongst agriculturists in the Punjab by which the collateral heirs, in his natural family, of a man who has been

adopted under a customary adoption succeed, in default of his lineal heirs, to the property which he acquired, or inherited, by virtue of his adoption? I would reply that, not only is there no such general custom, but that such a succession is quite opposed to the general principles which regulate the succession to land in the Punjab village communities.

On the appeal again coming before a Division Bench (Benton and Stogdon, JJ.), the appeal was disposed of as follows—

The plaintiffs, who are collaterals of Maya by blood, have failed to prove that they are by custom entitled to succeed to the property inherited by Maya from his adoptive father, Anokha. Their appeal therefore fails and is dismissed with costs.

Appeal dismissed.

Full Bench.

No. 13.

APPELLATE SIDE. { NAWABZADA MUHAMMAD KAMAR-UD-DIN KHAN,—
(JUDGMENT-DEBTOR),—APPELLANT,
Versus

PIARI LAL,—(DECREE-HOLDER)—RESPONDENT.

Case No. 198 of 1891.

(ROE, BENTON AND STODDON, JJ.)

Civil Procedure Code, Section 230 (b)—Annual or monthly payments—Decree directing payment at a certain date.

Decrees for annual or monthly payments fall within and are governed by the provisions of Section 230 (b), Civil Procedure Code, 1882.*

First appeal from the decree of H. E. A. Wakefield Esquire, Subordinate Judge, Karnal, dated 31st December 1890.

K. P. Roy, for appellant.

Rattigan, for respondent.

This was a reference to a Full Bench made by Roe, J., sitting in Chambers, to consider whether decrees for annual or monthly payments do or do not fall within the purview of Section 230 (b), Civil Procedure Code.

* Section 230—

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely):—

(b) Where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

The facts sufficiently appear from the order of reference.

ROE, J.—On 24th March 1876 the decree-holder obtained a 7th Novr. 1891. decree against the judgment-debtor for Rs. 5,672-13-6 “according to his confession,”—this clearly meant according to the written statement filed by defendant, and called an *ikbal-dawa*, which recites the plaintiff’s consent to the terms contained in it. And it must be held, as was held when the case was previously before this Court (see the order of May 14th, 1883), that the decree is on the same footing as if it had been one for the payment of Rs. 5,672-13-6 by annual instalments of Rs. 400 to be raised to Rs. 800 on the announcement of the new *jama*.

The *ikbal-dawa* also contained further detailed explanations, or provisions, as to the source from which the annual instalments were to be paid, and for their payment harvest by harvest, but these are not material for the point now before me, for it is admitted by Mr. Rattigan that if the main provisions of the decree regarding annual instalments do not make it one payable on a certain date within the meaning of clause (b), Section 230, Civil Procedure Code, it is not made so by the reference to a payment “harvest by harvest.”

This Court’s order of 14th May 1883 was passed on an appeal from the order of the Commissioner, holding that an application by the decree-holder for execution, dated 19th May 1880, was barred by limitation, not having been made within three years from what the Commissioner considered the last order or step in execution. This Court held (1) that the application was one falling under clause 6, Article 179, of the Limitation Act, for the realisation of an instalment falling due in December 1879 or January 1880, and was, in fact, within time; (2) that as no appeal was made from the order of attachment passed on 29th June 1880, on the application of 19th May, and therefore treating that application as within time, the question whether it was within time or not was *res judicata*.

Further steps continued to be taken in execution, apparently down to 1889. On the last application, that of 16th June 1890, it was objected by the judgment-debtor that the decree was barred under Section 230, Civil Procedure Code. This objection was overruled, the Court holding that the decree is one payable on a certain date, within the meaning of section 230, clause (b). The judgment-debtor appeals on the ground that this clause does not apply.

It is not contended that the question is *res judicata* by this Court's order of 14th May 1883, but it is urged that the Court was then right in holding that the application then before it was one under clause 6 of Article 179, the words of which, so far as they refer to a "certain date" are identical with those of clause (b) of Section 230, and that consequently the Court would now be right in holding that the decree *does* fall under the proviso last quoted.

For the decree-holder, the cases reported in I. L. R., 7 Mad., 80 and 83, are relied on as authorities for the proposition that directing a decree to be paid by annual instalments is not directing a payment to be made on a certain date. No. 19 of 1889, *Punjab Record*, is also quoted in its favour.

As already stated, Mr. Rattigan does not treat the reference to the harvests as affecting his case. I understand him to contend that, even if the decree had been merely made payable by annual instalments of Rs. 400, it would have directed payments to be made at a certain date, within the meaning of clause 6, and he points out that in No. 19 of 1889, the learned Judges, of whom he was one, were not prepared to go the length of the Madras High Court. But his main point is that the decree distinctly directed the payment of Rs. 800 a year at a certain date, *viz.*, the announcement of the new jama—an event which was known when the decree was passed to be about to occur, and which has, in fact, occurred since. The date has not been stated, but it had occurred before this Court's order of 14th May 1883, and it is admitted that it did not occur twelve years before the date of the application of 16th June 1890. This date, the announcement of the new jama, was, he contends, a certain date within the meaning of clause (b) of Section 230 and No. 159 of 1889, *Punjab Record*, is quoted in support of this contention.

I am inclined to think that the order raising the instalments to Rs. 800 per annum from the date of the announcement of the new jama hardly alters the nature of the decree, but I am not sure on this point. But what I doubt still more is the correctness of the rulings in the Madras cases, that a decree for an annual or monthly payment is not a decree for payment on a certain date, within the meaning of clause (b), Section 230, Civil Procedure Code, and clause 6, Article 179 of the Limitation Act. The judgments in both the cases are very brief, and the only reason given for them is that the learned Judges felt bound

to follow a previous decision of their Court. The judgment in 4 All., 155, is also very brief, and it is not clear whether the Court meant to rule that, as the instalments fixed in the case before it were not ordered by the original decree, but were agreed to by the parties after decree, as set forth in a petition on which the Court merely passed an order that it should be filed, the informality prevented the decree from being one directing payment on a certain date, or whether, taking it as a fact that there was a valid decree ordering monthly instalments, such an order was not an order for payment on a certain date. Although, as already stated, the learned Judges in *Punjab Record* No. 19 of 1889 expressly refused to commit themselves to the Madras ruling, still the decree before them was, like the one before me now, a decree for annual instalments payable harvest by harvest, and they held that it was not a decree for payment on a certain date.

The question whether such decrees, *i. e.*, decrees for annual or monthly payments, do or do not fall under clause (b), Section 230, Civil Procedure Code, is one of considerable importance and frequent occurrence, and as I am not at present prepared to hold that they do not, I think it right to refer it to a Full Bench. Should the answer to this question be in the negative, I would refer to the same Bench the further question, whether the order in the present case, that from the date of the announcement of the new jama Rs. 800 is to be paid annually, brings the decree under the clause quoted, and if so, whether the "certain date" fixed by it is the date of the announcement of the new jama, or any, or what, subsequent date.

The opinion of the Full Bench was delivered by

BENTON, J. (ROE and STODDON, JJ., concurring).—The question which has been referred to the Full Bench is—

Whether decrees for annual or monthly payments do or do not fall under clause (b), Section 230 of the Civil Procedure Code?

Should this question be answered in the negative, there is a further question to be disposed of by us, *viz.*, whether the order in the present case, that from the date of the announcement of the new jama Rs. 800 is to be paid annually, brings the decree under the above quoted clause, and if so, whether the certain date fixed by it is the date of the announcement of the jama, or any, or what, subsequent date?

As regards the prior question, we have had the benefit of having heard it very fully argued on both sides. The learned pleader for the appellant, in the course of his argument, referred to the two cases reported in I. L. R., 7 Mad., 80 and 83 ; to rulings of this Court, *Punjab Record* No. 19 of 1889, *Punjab Record*, No. 159 of 1889, also to I. L. R., 4 All., 155. On the other side, the learned Counsel referred us to I. L. R., 12 Bom., 65—68, and I. L. R., 14 Mad., 396.

The last quoted case had to deal with the same words (a certain date) in Article 179 (6) of the Limitation Act, which are to all intents and purposes of the same import as they have in Section 230, clause (b) of the Procedure Code.

In the report the Bombay case above cited is referred to, and also the previous rulings of the Madras High Court, which were not followed. In *Punjab Record* No. 19 of 1889 the payments were to be made "harvest by harvest," and reasons were given for holding that such payments were not payments to be made at a certain date, but it was expressly indicated that the Court was not prepared to go the full length of the Madras rulings. In the later case, the question to be decided was whether property having to be delivered after a certain date, the date of delivery was sufficiently ascertained for the purpose of Section 230 of the Procedure Code, and the learned Judge who decided that case, in finding in the affirmative, was able to quote in support of his decision the words of I. L. R., 7 Mad., 83 : "A certain date in Article 179 (6) of "the Limitation Act requires that an actual date should have "been specified either absolutely or in relation to some contingency." These words, however, appear to involve a virtual surrender of the position contended for by the appellant, for if a date be certain which may be ascertained by reference to the occurrence of a contingency, it does not appear why we should not hold another date to be a certain date which can be ascertained beyond all doubt by other means.

As regards authority, it is clear that the rulings in I. L. R., 7 Mad., have been dissented from both by the Bombay High Court and in the later rulings of the Madras High Court itself. The learned pleader for the appellant contended that, admitting that a payment ordered to be made annually was equivalent to a payment to be made that day year, with an option to pay earlier within the year, this was not equivalent to a payment to be made on a certain day of the

month in a certain year, because it laid on the creditor the obligation of receiving money at times when it might not be at all convenient to do so, which was inequitable and not in accordance with law. This objection is alluded to and anticipated in I. L. R., 12 Bom., where we find the words (p. 67) "construing the decree, as it ought to be construed, most favourably to the party on whom it bore, we must say that he became liable to pay Rs. 36 on the day year from its date." With regard to this point, the learned counsel on the other side quoted I. L. R., 2 Mad., 314, and I. L. R., 10, All., 602, to show that the rule of law is entirely the other way.

It has been so ruled by this Court in *Punjab Record* No. 20 of 1889, where authorities have been collected and considered and our opinion is that this objection cannot be sustained.

In our opinion, speaking generally, a payment to be made annually or monthly is exactly equivalent to a payment to be made, in other words, on or before that day year or that day month, and, in accordance with law, the words "or before" may be left out without altering the effect, so that such a payment is one to be made at a certain date. We think that this opinion, may be and should be applied to the construction of Section 230, clause (b) of the Procedure Code, with due regard to the context and to the objects and aims of the Legislature in that section, as we understand them.

The answer, therefore, we have to make to the question referred to is in the affirmative. This being so, it is unnecessary to consider the further question.

The appeal was finally disposed of by

ROS, J.—As the answer of the Full Bench shows that the execution of the decree generally is not barred by limitation, this appeal must be dismissed with costs. The executing Court will of course decide any other objection to the details of execution which may be raised before it. 22nd Feby. 1892.

Appeal dismissed.

No. 14.

APPELLATE SIDE. {

MAHMUD,—(DEFENDANT),—APPELLANT,

Versus

MOHAMDA AND AHMAD,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 1376 of 1889.

(RIVAZ & STOGDON, JJ.)

*Custom—Gift by widow—Compliance with conditions by donee—Gujars of Kharian tahsil, Gujrat District.**Found, that among Mussalman Gujars of the Kharian tahsil, Gujrat District, the power of alienation by gift possessed by a widow is strictly limited, and that unless the donee can prove that he has complied with the conditions which would validate the gift, such as that he has in fact maintained her, the alienation is invalid.**Punjab Record, No. 8 of 1891, referred to.**Further appeal from the decrees of F. Bullock Esquire, Divisional Judge, Jhelum, dated 4th December 1889.*

Fazl Din, for appellant.

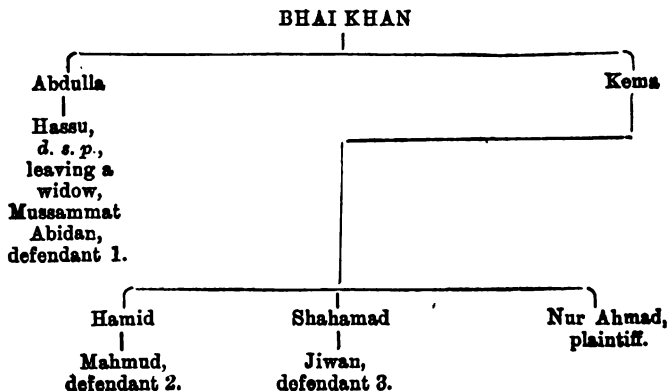
Nanak Bakhsh, for respondents.

The parties to this suit were Mussalman Gujars of the Kharian tahsil of the Gujrat District, and the only question for decision was as to the power of a sonless Gujar widow to make a gift of her husband's landed property to any one of his collaterals, to the exclusion of his other collaterals.

At the first hearing of the appeal, the Court (Rivaz and Stogdon, JJ.) directed a remand under Section 566, Civil Procedure Code, for further inquiry by the following judgment which was delivered by

17th April 1891.

STOGDON, J.—



We concur with the Divisional Judge in holding that Hassu did not treat Mahmud as his son and heir, and did not instruct his wife Mussammat Abidan to gift his estate to him.

Mahmud's father, Hamid, appears to have married Hassu's sister, who is his first cousin as well as his wife, and on that account both he and Mahmud have helped Mussammat Abidan to manage her property, and she has selected Mahmud as the person who has the best right to succeed to it.

The only question is whether the gift made by her to him is a valid one or not. Ordinarily, a gift of this nature is entirely opposed to custom.

The parties are Mussalman Gujars of the Kharian tahsil of the Gujrat District, among whom it has been held in *Punjab Record* No. 8 of 1891, that a sonless proprietor cannot, in the absence of an adoption, gift his ancestral estate to one collateral to the exclusion of others. Such being the case, it would appear improbable that a gift by a widow to one of her husband's collaterals can be valid, but both the *Wajib-ul-arz* and the *Riwaj-i-am* expressly sanction such gifts. The sanction in the former is certainly coupled with the condition that the widow must adopt the favoured collateral; and in the latter, that he must have been rendering her service, but the clauses appear to have been acted upon by the Courts from time to time, and there is no certainty that they wrongly express the custom. We think that a full inquiry regarding the validity of the gift is necessary. We therefore remand the case to the first Court with directions to ascertain from the principal Gujars of the Kharian and other tahsils of the Gujrat District, whether a widow has any power of gifting her husband's property, and, if so, to whom and under what conditions. The inquiry should be as exhaustive as possible, and any cases of gifts by widows should be carefully collected, and also of cases in which such gifts have been contested either successfully or unsuccessfully. A return should be submitted within three months through the Divisional Judge, who is requested to record his opinion. The originals of the *Wajib-ul-arz* and *Riwaj-i-am* should be submitted to this Court at the same time.

Upon a return being made to this order of remand, the final judgment of the Court was delivered by

15th Feby. 1892.

STODDON. J.—The further inquiry directed by this Court by its order of the 17th April 1891 has been made. Twelve zaildars have been examined, and they unanimously state that a sonless Gujar widow is competent to gift her husband's landed property to any one of his collaterals who has rendered her service, to the exclusion of his other collaterals. Several instances of such gifts have been cited, and in some cases they have been upheld by the Courts.

This evidence supports the *Riwaj-i-am*, which declares that a widow has ordinarily no power to alienate her deceased husband's property by gift, but that when she has grown old, and has no chance of remarrying, she can gift to any one of her husband's collaterals, or of her daughter's family, who may have been rendering her service, but in such case the donee is responsible for her maintenance. There is also a further declaration that the widow may sell or mortgage the property for payment of Government revenue or for personal necessity. The whole clause is merely an amplification of the rule that a widow's estate is a life one, and that she cannot alienate her deceased husband's property except for valid necessity. She has not an unlimited power of gift. She can only gift it to a relative under circumstances which would render alienation by sale or mortgage to a stranger legitimate. In one case she receives her maintenance as an equivalent for the alienation, and in the other she receives money out of which she maintains herself. It thus appears that her power of alienation by gift is strictly limited, and in every case the donee must prove that he has complied with the conditions which would validate a gift in his favour. Those conditions are that he must have rendered service to the widow, or, in other words, that he must have maintained her. In the present case, the donee quite failed to prove that he had complied with the conditions. On the contrary, it appears that he and his father have been cultivating the land for their own benefit, while the widow has been living at her paternal village, Kasana, where she also owned land which was cultivated by her husband, Hassu, during his lifetime. The alienation was entirely for the donee's benefit, and it was not trammelled with any conditions, nor is there any recital in the deed of gift that the donee had rendered service to the widow. We dismiss the appeal with costs.

Appeal dismissed.

Full Bench.**No. 15.**

DHANI DAS,—(DEFENDANT),—APPELLANT,

*Versus*AYA RAM AND PARSA MAL,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1137 of 1890.

(ROE, FRIZELLE & RIVAZ, JJ.)

Jurisdiction—Further appeal—Land-suit—Claim for share in an orchard, i. e., of the fruit trees.

A suit for possession of a half share in an orchard, that is, in the fruit trees, is not a "land-suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884.*

Punjab Record, No. 119 of 1890, referred to.*Further appeal from the decree of Khan Muhammad Hyat Khan, C.S.I., Divisional Judge, Mooltan, dated 18th April 1890.*

Sarbadhicary, for appellant.

Girdhari Lal, for respondents.

The plaintiffs, according to their amended plaint, sued for possession of a half share in an orchard, that is, in the fruit trees.

A difference of opinion having arisen between the learned Judges (Benton and Stogdon JJ.) sitting as a Division Bench, as to whether a further appeal lay to the Chief Court, which involved a consideration of the question whether the suit was a "land-suit," or an "unclassified suit," as defined in Section 3, Punjab Courts Act, 1884, the question was referred to a Full Bench of the Court. The following judgments were delivered—

STODDON, J.—In this case Parsa Mal and his mortgagee, 13th Novr. 1891. Aya Ram, sued Dhani Das for a declaration of ownership and possession of a half share of land along with an orchard on the Mohan Daswala well, the area of the land claimed being stated to be 12 kanals 11½ marlas.

In their plaint they stated that the well belonged to defendant's Guru, Bhai Mohan Das, and that he had given a half share in the land on an *adhlap*i tenure to Parsa Mal's father, Udha, in return for his planting an orchard of various

* Section 3 (2). "Land-suit" means a suit relating to land as defined in section 4 clause (1) of the Punjab Tenancy Act, 1887, or to any right or interest in such land.

kinds of trees. They asserted that defendant had ejected Parsa Mal eight years previously and they asked for a decree for possession.

Subsequently, they amended their plaint by striking out the claim for possession of the land, which they admitted to be defendant's property. They said that they merely wished to sue for possession of a half share in the orchard, i. e., in the fruit trees.

The first Court gave them a decree for a half share in the fruit and fruit trees of the orchard only, without any title to the land. Defendant appealed to the Divisional Judge, who dismissed the appeal, but at the same time altered the decree of the first Court by entering in it that plaintiffs are entitled to half the fruit of thirty-two mango trees standing along the water-course of the well, while those trees exist, and they must look after the said trees by manuring and watering them.

Defendant applied to the Divisional Judge for a certificate under Section 40 (1) (d) of the Punjab Courts Act, but his application was rejected on the 15th May 1890. He then applied to this Court for revision. In his petition he stated that the decree of the Appellate Court was slightly different from that of the first Court, but that as the decree passed on appeal recited that the appeal was dismissed and the order of the first Court confirmed, and as the application for permission to appeal had been rejected, he presented a petition for revision. Mr. Justice Benton, before whom the application came in Chambers, held that an appeal lay because the decree of the Divisional Judge modified that of the first Court in an important matter, and he directed that notice should issue with a view to remanding the case to the Divisional Judge for a finding as to which mango trees plaintiffs were entitled to half the fruit of. The parties appeared before him on the 3rd December 1890, and he then admitted the case to a Bench, because he was disposed to think that the suit was a revenue one of the description specified in Section 77 (i) of the Punjab Tenancy Act, *viz.*, one between a landlord and tenant arising out of the conditions on which a tenancy is held.

We are agreed, however, that the suit as laid is one for proprietary right, and that it is not a revenue suit. The next question is whether an appeal lies to this Court as of right.

My learned colleague informs me that he did not admit the application for revision as a further appeal under section 40, sub-section (2), of the Punjab Courts Act, but that he treated the case as an ordinary further appeal in a land-suit, in which the decree of the Divisional Court, consisting of a single Judge, varied the decree of the Court below. In my opinion the suit is not a land-suit but an unclassified suit of value not amounting to Rs. 1,000, and a further appeal does not lie to this Court as of right. Plaintiffs expressly stated that they admitted defendant to be proprietor of the land on which the fruit trees stand. All they claimed was a half share in the fruit trees. They claimed no share in the land occupied by them. The trees are no doubt immoveable property, but they certainly are not land as defined in section 4 of the Punjab Tenancy Act, nor are they land of any sort, though they are attached to land. According to Section 3, Act XVIII of 1884, a land-suit is a suit relating to land as defined in Section 4, clause (1), of the Punjab Tenancy Act, 1887, or to any right or interest in such land. The present suit relates to trees, which are not land, and I cannot see how any right or interest in land is involved when any intention to claim land is disclaimed. I can understand a suit for a standing tree being a land-suit, even if the land on which it stands is claimed only by implication but not expressly, but it appears to me that it is an unclassified suit if there is a distinct intimation that the claim does not include the land. I would therefore dismiss this appeal on the ground that no appeal lies to this Court.

BENTON, J.—I concur in my learned colleague's statement of the case, but I am unable to concur in his opinion that the suit is an unclassified one and that no further appeal lies, seeing that the Divisional Judge modified the decree of the first Court. 18th Novr. 1891.

I would maintain that the suit is a "land-suit" with reference to the definition in Section 3, clause (2) of Act XVIII of 1884, on the ground that the trees of which the plaintiff claims to hold possession and gather the produce are growing in land which is occupied for agricultural purposes, *viz.*, for an orchard, and so constitute a right or interest in the said land. I fail to see how it can be maintained that the plaintiff who claims a share of fruit trees growing in the orchard along with their fruit is not claiming a right or interest in the orchard which is absolutely necessary for the existence and growth of the trees.

No doubt the plaintiff says he does not claim the land of the orchard, but if he claims no right or interest in it he appears to me to be simply illogical and his admission, which is inconsistent with his claim, must be disregarded.

The question with regard to which my learned colleague and I are at difference is : Whether the suit is a land-suit, or an unclassified suit, and accordingly whether a further appeal to this Court lies ?

For the disposal of this difference of opinion the case must be referred to another Judge of the Court under section 575 of the Civil Procedure Code, after this order has been shown to Mr. Justice Stogdon, to ascertain whether the matter at issue is correctly stated.

14th Novr. 1891. STODDON, J.—I agree to the reference being made.

The opinion of the Full Bench was delivered by

18th Decr. 1891. ROE, J. (FRIZELLE & RIVAZ, JJ., concurring).—The facts and the point referred to us are fully stated in the order of reference.

We are of opinion that our answer should be that the suit is not a land-suit. The suit resembles the one published as *Punjab Record* No. 119 of 1890, in so far as it is one to enforce a right claimed by plaintiff, not in any land, but in trees growing on that land. The point decided in No. 119 of 1890 was no doubt merely the point admitted by the referring order, that the suit is not one falling under clause (i), Section 77, Act XVI of 1887. But the principles of the decision appear equally applicable to the present case. The learned Judge (Sir Meredyth Plowden) remarked (at page 392): "It is a common practice to sell or let "or mortgage fruit trees independently of the land on which "they stand, and such a sale gives the purchaser no interest in "the land."

With this last remark we quite concur, and it appears to us that it necessarily follows that the interest or right now claimed by plaintiff is not an interest or right in land, and that the suit is not a land-suit.

22nd Feby. 1892. STODDON, J. (RIVAZ, J., concurring).—The Full Bench having decided that this is not a land-suit, the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

Full Bench.

No. 16.

PIR BAKHSH & NIZAM-UD-DIN,—(DEFENDANTS),—
APPELLANTS,

Versus

MANGAL & LEHNA,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1232 of 1890.

(ROE, RIVAZ & STODDON, JJ.)

*Mortgage for Rs. 400—Subsequent sale for additional sum of Rs. 99-8-0
—Registration compulsory or optional.*

The plaintiffs mortgaged their occupancy rights in certain land for Rs. 400. They subsequently obtained a further sum of Rs. 99-8-0 from the mortgagees, selling to them out and out their occupancy rights by an unregistered deed of sale, the material part of which was as follows :—

Whereas we own the occupancy rights in 17 ghumaos 2 kanals 1 marla of land which are already mortgaged for Rs. 400 to N. and P., we have now taken a further sum of Rs. 99-8-0 and have absolutely sold the said occupancy rights.

Held, that the registration of the document was optional.

Further appeal from the decree of C. P. Bird Esquire, Additional Divisional Judge, Amritsar, dated 11th June 1890.

P. C. Chatterji, for appellants.

Bates, for respondents.

This was a reference to a Full Bench to determine whether the registration of a deed of sale for Rs. 99-8-0 (Rs. 400 having been previously advanced by the purchasers on mortgage) was compulsory or optional.

The order of reference by the Division Bench (Stoddon & Beachcroft, JJ.) was as follows—

STODDON, J.—The occupancy rights of Mangal and Lehna in 17 ghumaos 2 kanals 1 marla of land were mortgaged for Rs. 400 to Nizam-ud-din and Pir Bakhsh, sons of Alla Ditta. On the 3rd May 1886 the mortgagors took a further sum of Rs. 99-8-0 from the mortgagees and sold their occupancy rights absolutely to them by unregistered deed of sale, the material portion of which is as follows—

Whereas we own the occupancy rights in 17 ghumaos 2 kanals 1 marla of land, which are already mortgaged for Rs. 400 to Nizam-ud-din and Pir Bakhsh, we have now taken a further sum of Rs. 99-8-0 and have absolutely sold the said occupancy rights.

The question is whether this deed required registration, or, in other words, whether it purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest of the value of Rs. 100 and upwards to or in immoveable property. Both the Courts below have found that it ought to have been registered. According to the first Court it shows that on receiving Rs. 99-8-0 in cash in addition to Rs. 400 the first mortgage money, the sale of the occupancy rights was effected in consideration of Rs. 499-8-0. This is quite correct as far as it goes. The occupancy rights were sold for Rs. 499-8-0, but the question is not as to what was sold, but as to the extent of the right created, &c., by the deed of the 3rd May 1886. The Divisional Judge concurred with the first Court that registration was compulsory, without giving any reasons for so doing.

In my opinion the document did not require registration. I think it was executed in good faith and that the parties thought that it operated to transfer an interest of the value of Rs. 99-8-0 only, and that on that account they refrained from registering it. I consider that it creates on the mortgagees' behalf an interest in the occupancy rights of the value of Rs. 99-8-0 in addition to their already existing mortgagees' interest of the value of Rs. 400, and that it extinguishes the remaining rights which the mortgagors possessed in the property, the value of which purports to be Rs. 99-8-0. No doubt the occupancy rights were sold for Rs. 99-8-0, but the sale was effected by two deeds, one of which gave the mortgagees a lien on them for Rs. 400 and authorised them to hold possession of them till they were redeemed, and the other, which for a further consideration of Rs. 99-8-0 transferred to the mortgagees the mortgagors' equity of redemption and extinguished the remaining right which the mortgagors had in the land, and which is valued at Rs. 99-8-0 in the deed of sale. It is of course possible to construe the deed as one purporting to create or declare an interest of the value of Rs. 499-8-0 in the occupancy rights, but such a construction would in my opinion be contrary to the intention of the parties and also militate against the principle, that between different meanings that is to prevail which tends to support the instrument.

For the above reasons, I would accept this appeal and dismiss the suit with costs throughout on the ground that

plaintiffs having sold their equity of redemption are not entitled to maintain the present suit for redemption.

BEACHCROFT, J.—I entertain considerable doubts as to the correctness of the result arrived at by my learned colleague. The instrument in question appears to me, as at present advised, to be a sale of the plaintiffs' occupancy rights for the sum of Rs. 499-8-0, of which sum Rs. 400 had been advanced on mortgage. 25th July 1891.

Looking upon the document from the point of view adopted by my learned colleague, would not the instrument equally require registration, extinguishing, as it does, the plaintiffs-mortgagors' rights to redeem property mortgaged for more than Rs. 100 ?

As the point appears to be one of some difficulty and importance, I would propose that the question of whether the instrument requires registration or not should be referred to a Full Bench as provided by Section 11 of the Punjab Courts Act.

STODDON, J.—I agree to the proposed reference to a Full Bench. 27th July 1891.

The opinion of the Full Bench was delivered by

RIVAZ, J. (ROX & STODDON, JJ., concurring).—The question referred to us is whether the document in this case (the purport of which is sufficiently set out in the judgment of Mr. Justice Stoddon) is compulsorily registrable under section 17 of the Registration Act. That depends upon whether or no it is an instrument which purports or operates to create or declare a right, title, or interest to or in immoveable property of the value of Rs. 100 or upwards. That it operates to create a right in immoveable property is apparently admitted on both sides. The dispute is as to the value of the right created. On one side it is contended that the instrument evidences a sale of occupancy rights in land for Rs. 499-8-0 : on the other, that it only creates a right in that land to the value of Rs. 99-8-0, the transaction really being a sale for that sum of the vendor's equity of redemption, the only subsisting right in the land which he had to dispose of when the deed was written. In our opinion the document may be legitimately construed as only creating a right of the smaller value, i. e., of the value of Rs. 99-8-0. In one sense, perhaps, the instrument shows that an out and out sale of the occupancy rights has taken place for

Rs. 499-8-0. But out of this sum Rs. 400 were already due from the mortgagor to the mortgagee on a separate transaction and under a different instrument, and the object of the operative part of the present deed is merely to declare that the remaining interest in the land has been sold for Rs. 99-8-0. Upon this view, the document did not require registration, and that is our answer to the reference.

On the appeal again coming before a Division Bench, the judgment of the Court was delivered by

15th Feby. 1892.

RIVAZ, J. (STODDON, J., concurring).—The Full Bench having decided that the deed of sale relied upon by the defendants is admissible in evidence, though unregistered, we consider that the plaintiffs' suit fails. We are not satisfied, after hearing Mr. Bates, that the transaction was anything else but a completed sale, and we think it unnecessary to decide in the present case whether the consideration recited in the deed was or was not actually paid, inasmuch as the plaintiffs have entirely failed to establish that the payment of the money was a condition precedent to the sale being considered complete.

We therefore accept this appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

Full Bench.

No. 17.

KHUDA BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

FAZL DIN,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE. }

Case No. 443 of 1889.

(ROE, BENTON AND RIVAZ, JJ.)

Tenancy Act, 1887—Unauthorised alienation by occupancy tenant—Tenant's right to recover possession from landlord.

When an occupancy tenant has made an unauthorised alienation of his holding including the giving of possession to the alienee, and the landlord has sued successfully to have the alienation declared void and to recover possession from the alienee, it is not a good answer to a suit by the alienor against the landlord to obtain re-entry on his holding, that the plaintiff is not able to show that he is no longer bound by the contract, either because the alienee has taken back his money, or because the contract has been put an end to in some other way.

Punjab Record, No. 74 of 1884, decided with reference to the provisions of the Tenancy Act, 1868, not followed.

Further appeal from the decrees of F. P. Beachcroft Esquire, Divisional Judge, Gujrat, dated 4th February 1889.

Golak Nath, for respondent.

In the decision reported as *Punjab Record*, No. 74 of 1884, it was decided by the Court (Barkley and Burney, JJ.) that the doctrine, that an attempt by an occupancy tenant to alienate his holding in contravention of Section 34 of the Punjab Tenancy Act, 1868, did not involve a forfeiture of the tenure, could not be extended to the length of holding that, when the tenant has given another person a right to possession as against him by an invalid transfer, and the landlord has had that transfer set aside as inconsistent with his rights, the tenant, having parted with the possession, could recover that possession from the landlord without showing that he was no longer bound by the contract inconsistent with the rights of the landlord. The tenant might be able to show that because the purchaser had released him from the contract by taking back the purchase-money, or by substituting a new contract not affecting the land, or because, as between him and the purchaser, it had been put an end to in some other way. If he was not able to show this, he was not entitled to recover the land, because the contract by which he was bound to the purchaser was inconsistent with his duties as tenant.

The Division Bench (Frizelle and Rivaz, JJ.) entertaining doubts whether this judgment was good law, referred the question for the opinion of a Full Bench by the following interlocutory order made by

RIVAZ, J.—This is a case of a plaintiff who, claiming still to be an occupancy tenant, is suing his landlord for recovery of his holding, which has passed into the defendant's hands by reason of the tenant having mortgaged his rights with possession to a third party against whom the landlord has succeeded in a suit to declare the mortgage void, and to obtain possession

from the mortgagee. Such a suit is under the *Punjab Record* 1891, No. 45. recent Full Bench ruling cognizable by the Civil and not by the Revenue Courts, and Civil Judgment No. 104, *Punjab Record*, 1890, which decided to the contrary, must be now taken to be overruled.

23rd June 1891.

The suit has been dismissed by the Divisional Judge upon the ground that when it was instituted, the plaintiff had not settled with his mortgagee, whose lien on the land therefore still existed, so that the plaintiff had no cause of action when the suit was filed. This view is in accordance with Civil Judgment No. 74, *Punjab Record* of 1884, a ruling which has, we believe, been followed in later decisions of this Court, though we can find no published judgment which approves of it.

We entertain doubts as to whether the above cited decision is a sound one. *Primâ facie* it appears to us that, as soon as the landlord has exercised his right to put an end to the contract between the tenant and his mortgagee, the only question ordinarily remaining between him and the tenant is whether the latter's unauthorised alienation has resulted in a forfeiture of his right to re-enter as tenant. If it has not, it appears to us doubtful whether the exact state of things between the tenant and his alienee can affect the former's right to be put back into possession by his landlord. The alienee may or may not have a remedy against his alienor after the alienation has been set aside. Probably he has a right to claim a refund of the money advanced by him. But how does the exercise or non-exercise of this right by the alienee, or the anticipation or non-anticipation of such exercise by the alienor, affect the question between the *quondam* tenant and his alleged landlord?

We think the question, whether the ruling No. 74, *Punjab Record*, 1884, is good law, is one which should be considered by a Full Bench, and we therefore refer the following question—

When an occupancy tenant has made an unauthorised alienation of his holding and given possession to his alienee, and the landlord has sued successfully to have the alienation declared void and to recover possession from the alienee, and the alienor institutes a suit against the landlord to obtain re-entry on his holding, is it a good answer to such suit that the plaintiff is not able to show that he is no longer bound by the contract, either because the alienee has taken back his money, or because the contract has been put an end to in some other way?

The opinion of the Full Bench was delivered as follows by

BOZ, J. (BENTON & RIVAZ, JJ., concurring).—The ques- 20th Novr. 1891.
tion referred to us and the grounds for referring it are fully set forth in the order of reference. We are of opinion that it must be answered in the negative.

The reasons given for a contrary view in *Punjab Recrd* No. 74 of 1884, appear to be that the learned Judges who delivered the judgment in that case considered that, apart from any question whether or no an attempt on the part of a tenant to make an alienation not authorised by law involved a forfeiture of his rights, the fact that he had admittedly parted with his rights under a contract to a third party was a bar to his suit, unless he could show that this contract had been put an end to as between him and the third party, by the refund of the purchase-money, or a release, or by some other act between them.

The fact that, by the action of the landlord, the third party had been prevented from deriving any benefit from the contract, did not put an end to it as between the third party and the plaintiff, or restore to the latter the rights he had divested himself of under the contract.

We think it doubtful if it could ever be said that after the landlord had successfully intervened, there still existed a contract valid as between the tenant and the alienee. But Section 60 of Act XVI of 1887 (*Punjab Tenancy Act*) appears to us to make it clear that this cannot be said now. That section declares a transfer not in accordance with the provisions of the Act to be a transaction voidable at the option of the landlord. When therefore the landlord exercises his option successfully the transaction becomes altogether void, and we do not think it can be said that there is a valid contract existing anywhere. The voiding of the contract may, as pointed out in the order of reference, entail certain obligations or confer certain rights on the original parties to it, but the contract itself has been declared void, and it appears to us immaterial at whose instance this was done. The plea in bar to the suit, that the plaintiff cannot sue because he has transferred his rights to another person, necessarily implies that the transfer was a valid one, and it is sufficiently met by proof that the transfer had been declared void.

We reply to the reference accordingly.

The final judgment of the Division Bench was as follows—

15th Feby. 1892. RIVAZ, J. (STODDON, J., concurring).—The Full Bench having decided that the only substantial plea taken in the lower Court is no sufficient answer to the suit, the appeal is accepted and the decree of the first Court for possession of 14 kanals 15 marlas is restored; but each party will pay his own costs throughout.

Appeal allowed.

No. 18.

MIRAN BAKSH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

RAHIM BAKSH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1122 of 1890.

(RIVAZ & STODDON, JJ.)

Suit for property claimed under private reference to arbitration—Validity of award—Award though bad in part when good for the rest.

The two sons and the widow of R. referred the question of the partition of R's. property to two arbitrators. The arbitrators duly made an award dividing the property, which was partly situate in the Punjab and partly at Baroda (Bombay Presidency).

The eldest son instituted a suit to recover possession of certain of the property situate at Amritsar which fell to his share under the award.

The defendants contended, *inter alia*, that the award was incomplete and invalid in that it failed to make a complete partition of the Baroda property.

Held, that the objection was not sustainable. This was not a proceeding to enforce an award under the Civil Procedure Code, in which case it would be necessary either to affirm the award in its entirety or wholly reject it. It was open to the Court in the present proceeding to consider whether the rest of the award might not be good, even though one portion of it was bad.

Where arbitrators act in excess of their authority and this portion of their award can be struck out, and the remainder of the award still contains a final determination of all material questions submitted, the valid portion of the award may be maintained and the void portion rejected.

The principle, that though the award be deficient as to a matter within the submission, if it be separable, the rest of the award may often be supported, adopted and applied.

First appeal from the decree of F. L. Bailey Esquire, District Judge, Amritsar, dated 30th July 1890.

K. P. Roy, for appellants.

Higgins, for respondent.

The material facts sufficiently appear from the head note.

The judgment of the Chief Court was delivered as follows
by

RIVAZ, J.—This dispute relates to a portion of the estate 22nd Feby. 1892. of one Ramzi, *pahlwan*, the plaintiff Rahim Bakhsh being the eldest son of the said Ramzi, the first defendant, Miran Bakhsh,

his younger son, and defendant 2, Mussamat Aziz Bibi, his widow. After Ramzi's death, the parties agreed (upon the 9th December 1887) to refer the matter of the partition of his estate to two arbitrators named in the agreement, well known and respectable pleaders of Amritsar. Provision was made for reference to an umpire in case of a disagreement. The arbitrators were (1) to ascertain what property Ramzi left at his death, and (2) to divide that property according to the Muhammadan law. The matter evidently proved a troublesome one; but eventually, on the 13th December 1889, the two arbitrators gave an unanimous award, purporting to deal with all matters referred to them. The written award is full and elaborate. It finally deals with the property under five heads—

- (a). Immoveable property.
- (b). Moveable property.
- (c). Cash converted into gold *passas*.
- (d). Women's ornaments.
- (e). Certain property at Baroda.

Items (a), (b), (c) and (d) are divided by the arbitrators according to the shares to which each party is entitled by Muhammadan law, elaborate lists being given of each party's share, and certain inequalities being adjusted by cash payments and receipts. The award recites that each party has been put in possession of his or her respective properties, save as to a *haveli* and a *tawela* at Amritsar. As to these, it is stated, and the lists show, that the *haveli* has fallen to plaintiff and the *tawela* to defendant 1; that each brother is in possession of a portion of the other's property; that each shall surrender the whole of each property to the other within three weeks, otherwise recourse can be had to the Courts. As to (e), the Baroda property, the award recites that its exact amount and value cannot be ascertained, but the parties will be considered entitled to this property also in proportion to their specified shares.

On the 25th March 1890, Rahim Bakhsh brought the present suit to recover possession of the portion of the *haveli* just referred to, which continued in defendant's possession after the award, expressing his willingness to relinquish possession of all portions of the *tawela* which fell to defendant 1. The reply of both defendants challenged the validity of the award, as a whole, upon several grounds which will be alluded to in due course, the contention being that the award being bad, as a

whole, on account of fatal defects therein, could not be enforced even to the extent of the plaintiff's prayer in his plaint.

The first Court after full inquiry decreed the claim, and the defendants appeal to this Court. Before us, the validity of the award is challenged upon a variety of grounds, but they all allege either that the arbitrators have exceeded their powers in deciding matters not referred to them, or that they have omitted to decide matters included in the reference, or that they have been guilty of legal misconduct, as appears from errors and omissions patent upon the face of the award itself.

The lower Court appears to have held that it was not open to the defendant to attack the award on the above grounds in the present proceeding. It lays stress upon the fact that the parties are admittedly in possession of the property awarded to them, with the exception only of the *haveli* and *tawela*; and, finally, the Court points out that in its opinion the defendants' remedy, if they wish to set aside the whole award, is by regular suit, or by way of application under Section 525, Civil Procedure Code. It is difficult to see how the latter remedy is open to the defendants, who wish, not to enforce, but to nullify the award; and as to the remedy by regular suit, I may say at once that the fact of such a remedy being open to the defendants, cannot, in my opinion, possibly detract from their right, when the plaintiff has brought the award into Court with a view to obtaining specific performance of one of its provisions, to take any objections to the award as a whole, which tend to show that the award is invalid and void. It might of course, under certain circumstances, be open to the plaintiff to show that the defendants had by acquiescence in the main provisions of the award, estopped themselves from objecting to one of its details. But this is not the way that the case was put, either in the first Court, or in the argument before us, and this possible view of the case may therefore be left out of consideration. The lower Court, however, notwithstanding the opinion expressed as above, proceeded to adjudicate upon the defendants' objections to the validity of the award, and, after overruling them all, decreed the claim. It was urged before us that many of these objections had been disposed of in too summary a manner, but it was not alleged that any evidence had been excluded, or that the record was incomplete, or that there was any impediment to our finally disposing of the case.

Before us, the defendants' learned pleader pressed with great earnestness the specific objections taken in the first Court, as well as some others which he deemed worthy of notice. All his arguments are fairly covered by the written grounds of appeal, and we therefore heard him fully upon all points, though it is possible that some of his least weighty objections will not be mentioned in detail in this judgment. His argument was a very lengthy one, and some of the objections taken to the award were obviously insufficient to warrant its being set aside.

I will first deal with the points which alleged either excess of their authority by the arbitrators, or the omission to decide matters falling within the reference.

It was first contended that the arbitrators should have taken up the question of the widow's right to dower under the Muhammadan Law, and should have made this a first charge upon the estate before dividing the residue. The lower Court disposed of this point upon the ground that it was a question outside the reference. I prefer to disallow the objection upon the ground that there is no evidence to show that the matter of dower was ever brought to the notice of the arbitrators,—still less that any evidence was tendered to show that any dower was due. Neither in the voluminous written arguments submitted to the arbitrators (including that of the widow herself), nor in the award, nor even in the present case, until a very late stage of the proceedings, can I find any trace of any mention of a claim to dower, and it is a significant fact that though both of the arbitrators were examined as witnesses in the present case, not a single question was put to either of them with reference to this matter. It was urged before us that there was evidence to show that a petition on the subject had been presented to the arbitrators, though admittedly the petition itself is not with the present file; but even conceding this much, that some claim to dower may have been put forward by the widow, it certainly does not appear that any effort was made to substantiate the claim; and I find it, therefore, impossible to hold that the omission to adjudicate upon any such matter in the award is fatal to its validity.

Again, it was urged that the arbitrators acted in excess of their powers in dealing with property of third parties, *viz.*, the jewels of the ladies of the family, including the wives of plaintiff and defendant 1. In my opinion this objection fails entirely. The arbitrators (apparently without objection, but

this is immaterial) recite in the award that an issue for decision is, whether the ornaments of the ladies mentioned are or are not to be treated as part of the estate of the deceased, Ramzi. The finding is that they should be so treated; and they are ascertained and divided accordingly.

Then it was contended that the award was incomplete and fatally defective, because it failed to make a complete partition of the Baroda property. There is, I think, more force in this contention than in those which preceded it. But at the same time, I am of opinion that it is not necessary to pronounce the whole award void and of no effect on account of this alleged want of completeness. It is clear that the arbitrators did all they could to ascertain the details and amount of the Baroda property. Personal inquiry was not feasible, owing to the distance at which the property was situated, and neither party appears to have taken the necessary steps to properly elucidate this part of the case. This is not a proceeding to enforce an award under the Civil Procedure Code, in which case it would be necessary either to affirm the award in its entirety, or wholly reject it. It is open to the Court in the present proceeding to consider whether the rest of the award may not be good, even though one portion of it is bad. It is perfectly clear that, where arbitrators act in excess of their authority and this portion of their award can be struck out, and the remainder of the award still contains a final determination of all material questions submitted, the valid portion of the award may be maintained and the void portion rejected. But there is also authority for saying (*Russell on Arbitration*, 6th edition, 336) that "though the award be deficient as to a matter within the submission, if it be separable the rest of the award may often be supported"; and I think that the above principle should be applied to the present case. The portion of the award relating to the Baroda property is quite separate from the rest, and I am therefore not prepared to hold that the incompleteness of the division of this particular property vitiates the whole award.

The other objections urged rather fall under the head of misconduct and may be briefly dealt with. It is admitted on all hands that no corruption can be seriously imputed to the arbitrators. What is alleged is said to amount to judicial misconduct, but nothing worse. In this connection may be mentioned the argument, that the defendants were not fully heard inasmuch as after the plaintiff had replied to their

written arguments, no further rejoinder by them was permitted. This I consider a most unreasonable accusation against the arbitrators. The defendants were given as full an opportunity of arguing their case as if the arbitrators had been sitting as Judges in a judicial proceeding. They were entitled to no more, and probably to less, consideration than they got in this matter. It was discretionary with the arbitrators to follow whatever procedure they considered most suitable to the occasion, and an argument, that any party was not fully heard, would have to be very clearly established before effect could be given thereto.

Then it was attempted to show that the award on the face of it contained such flagrant errors and omissions as plainly proved the grossest carelessness and partiality on the part of the arbitrators. Here I consider that the onus lay very heavily upon the defendants, and that they signally failed to discharge it. An attempt was made to show that in settling the cash items admitted sums had been wilfully excluded from consideration, and others not divided. Nothing of the sort was in any way established. A perusal of the award shows how the division of all cash items mentioned therein was arrived at, and that the division is complete. As for items said to be omitted, there is absolutely nothing to show that they were not considered, far less that any item was wilfully omitted, and the clearest possible proof would be required in support of allegations of this description. One of the arbitrators was questioned about an item of Rs. 1,500 alleged to have been omitted, and promptly replied that it had been included in the calculation. There is no force in the argument founded upon the adjustment of the item of Rs. 600 in para. 12 of the award, nor in the allegation of error as to the calculation of interest in the last para. of clause 6. Every presumption should be in favour of the correctness of the award, and alleged mistakes should be convincingly established.

The last ground of appeal was not pressed, and Mr. Higgins produced a certified copy of the execution proceedings which have followed the first Court's decree to show that plaintiff has only obtained possession of the *haveli* in the suit after relinquishing all rights in the defendant's *tawela*.

In my opinion the appeal fails upon all points and should be dismissed with costs.

Appeal dismissed.

No. 19.

MUSSAMMAT KARMON & OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

JIWAN MAL,—(PLAINTIFF),—RESPONDENT.

} REFERENCE SIDE.

Case No. 6 of 1891.

(ROE & RIVAZ, JJ.).

Jurisdiction—Civil and Revenue Courts—Suit for land and mesne profits.

The Court of first instance (a Civil Court) entertained and disposed of a suit in which the possession of land was claimed and also *mesne* profits. The Court decreed in the plaintiff's favour both for the land and the *mesne* profits.

Held, that the claim as laid, was partly cognizable by the Civil and partly by the Revenue Court.

The first Court should have amended the plaint by striking out the claim for *mesne* profits, referring the plaintiff to the Revenue Courts in respect to this portion of their claim, and deciding the suit as one for land only.

The Appellate Court's duty was to remedy the error by, in any case, striking out of the decree the portion thereof awarding *mesne* profits, on the ground that the first Court had no jurisdiction over the matter and to hear and decide the appeal so far as it related to the land.

Observations as to the making of references to the Chief Court under Section 617, Civil Procedure Code, in cases in which a further appeal will lie upon a certificate granted by the Divisional Judge, or in which an application for revision can be preferred under Section 622 of the Code.

Case referred by J. C. Brown Esquire, Divisional Judge, Feroz-pore, under Section 617, Civil Procedure Code, by order dated 17th June 1891.

This was a reference to the Chief Court under the provisions of Section 617, Civil Procedure Code.

The facts and the point on which doubt was entertained by the Divisional Judge sufficiently appear from the judgment of the Court which was delivered by

RIVAZ, J.—In replying to this reference, we think it right to point out that, though the submission thereof is within the terms of Section 617, Civil Procedure Code, there was, in our opinion, no practical necessity for any reference to be made. The appeal to the Divisional Judge, which has given rise to the reference, must be deemed to be an appeal in which the

22nd Decr. 1892.

decree is final for the purposes of Section 617, Civil Procedure Code, by virtue of Section 44 of the Punjab Court's Act. At the same time, the suit out of which the appeal arises is a land suit in which an appeal from the Divisional Judge's final order would lie as of right, if he reversed or modified the first Court's order. Otherwise, an appeal would lie upon a certificate granted by the Divisional Judge, and, finally, if the right of appeal was barred, the question, which is one of jurisdiction, could be considered by this Court on revision. We will now proceed to answer the reference.

The question referred is practically this. The Civil Court has disposed of a suit in which possession of land is claimed and also *mesne* profits. The decree is in the plaintiff's favour both for land and *mesne* profits, and the defendant has appealed. The Divisional Judge is of opinion that the Civil Court had not jurisdiction over the portion of the claim relating to *mesne* profits, but is doubtful as to the proper order to pass upon the appeal.

Now, we agree with the Divisional Judge that the claim, as laid, was partly cognisable and partly non-cognisable by the Civil Court. We also think it quite clear (though here we differ from the Divisional Judge) that the *whole* claim is equally not within the cognizance of the Revenue Court. We are further of opinion that the course to be followed under these circumstances presents no substantial difficulty whatever. The first Court should have amended the plaint by striking out thereof the claim for *mesne* profits, leaving the plaintiffs (if so advised) to take action in the Revenue Court with regard to this part of their claim. It should have proceeded to decide the case as one for the land only. As the first Court did not act as above, the Divisional Judge must remedy the error by, in any case, striking out of the decree the portion awarding *mesne* profits on the ground that the first Court had no jurisdiction over the matter, and hear and decide the appeal, so far as it relates to the land itself, upon the merits. There neither is, nor was, any reason to *return* the plaint, and the question as to whether the claim for *mesne* profits will or will not be found by the Revenue Court to be barred by time is one with which the Divisional Court need not concern itself. As to the possibility of a conflict arising in cases like the present between the opinion of the Civil and Revenue Courts as to the ownership of the land, we think that the danger is not very obvious. As the Civil

Court, and the Civil Court alone, can decide finally who is owner of the land, the Revenue Court will naturally be likely to accept, even assuming that it is not legally bound to accept, the Civil Court's decree upon this point. If the suit for *mesne* profits precedes the suit for possession in the Civil Court, the Revenue Court can take action under Section 98 of the Tenancy Act.

The opinion above expressed affords a sufficient answer to the reference.

Reference returned.

No. 20.

ILAH I BAKHSH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

FATTA & OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1107 of 1890.

(BENTON & STODDON, JJ.)

"Land-suit"—Village graveyard—Further appeal.

The plaintiffs sued, alleging that 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that the defendants had brought 6 kanals of it under cultivation two years previously, and made thorn enclosures and taken possession of certain portions.

Held, that the suit was not a land-suit, and that the suit being valued at Rs. 150, a further appeal to the Chief Court was not competent without a certificate from the Divisional Judge under Section 40, sub-section 1 (d), Punjab Courts Act.

Further appeal from the decree of Colonel H. J. Lawrence, Divisional Judge, Ferozepore, dated 8th May 1890.

Grey, for appellant.

Krishna Singh, for respondents.

The preliminary question arose in this case as to whether a further appeal was maintainable without a certificate from the Divisional Judge under Section 40, sub-section 1 (d), Punjab Courts Act.

The suit as laid, was based on the followings allegations—

That 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village.

That defendant 1 had brought 6 kanals of it under cultivation two years previously.

And that defendants 1, 2 and 5 had made thorn enclosures and taken possession of certain portions.

The suit was valued at Rs. 150. The first Court made a decree in the plaintiff's favour, but the Divisional Judge on appeal dismissed the suit.

The Court decided that the suit was not a land-suit as defined in Section 3, sub-section (2), Punjab Courts Act. The judgment of the Court was delivered by

31st March 1892.

STODDON, J.—In their plaint, plaintiffs alleged that 56 kanals 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that corpses had always been buried there; that defendant 1 had brought 6 kanals of it under cultivation two years previously; and that defendants 1, 2 and 5 had made thorn enclosures and taken possession of certain portions. They prayed for a declaration that they were not entitled to take possession as they had done, and for an injunction to them to restore the land to its former condition. The suit was valued at Rs. 150. The first Court passed a decree in plaintiffs' favour, but on appeal their suit was dismissed by the Divisional Judge. They have appealed to this Court and the question arises whether the suit is a "land-suit" or an "unclassified suit." If it is an unclassified suit, a further appeal does not lie to this Court without the production of a certificate under Section 40 (1) (d) of the Punjab Courts Act. The suit is about land, but it is not a land-suit as defined in Section 3 (2) of Act XIII of 1888, unless it relates to land which is occupied or has been let for agricultural purposes, or for purposes subservient to agriculture, or for pasture, or for any right or interest in such land.

Appellant's counsel urges that the land is really culturable land which has been reserved for the excavation of graves, and that it is occupied or occupiable for agricultural purposes subject to the right of the villagers to be buried in it. He further points out that it is admitted that defendant 1 has

occupied No. 455, aggregating 6 kanals 12 marlas, for agricultural purposes for some years, and he contends that, though plaintiffs want the land to be reserved as a graveyard, there is nothing to prevent its being used for agricultural purposes by any one who may be entitled to so use it, although the space available for such purposes will gradually be contracted in consequence of its being taken up for graves. There is no doubt that 6 kanals 12 marlas of the land have been occupied for agricultural purposes by one of the defendants for some years, but plaintiffs alleged that his occupation was that of a trespasser, that the land was a graveyard, and that the occupation for agricultural purposes was improper. Their suit was clearly for land, which according to their own showing was occupied for a graveyard. They admitted temporary occupation for agricultural purposes, but they asserted that such an occupation was an unusual and improper one, and, in fact, a perversion of the land from its proper occupation as a graveyard. They said, in effect, that the land was not properly occupied for agricultural purposes, and their claim was tantamount to an assertion that the land was not land as defined in Section 4 (1) of the Punjab Tenancy Act. In order to obtain a right of further appeal, they now assert that it is "land" as defined in that section, but it is clear that they can only win their appeal by showing that it is not such land.

In the second ground of appeal, it is alleged that it has been used as a graveyard for the last sixty-four years, and in the fourth that there are about six hundred graves in it.

In our opinion, the only reasonable way of deciding the class of the suit is to consider the claim as laid. The suit, when brought, was clearly a suit for "land," other than "land" defined in Section 4 (1) of the Punjab Tenancy Act, and it follows that it was not a land-suit. The mere fact that defendants may have cultivated a portion of the land cannot change the nature of the suit as laid. We hold that the suit is an unclassified one of less value than Rs. 1,000, and that an appeal does not lie without a certificate. We therefore dismiss this appeal with costs.

Appeal dismissed.

No. 21.

APPELLATE SIDE. {

UMAR KHAN & OTHERS,—(DEFENDANTS),—
APPELLANTS,*Versus*

NAMDAR KHAN,—(PLAINTIFF),—RESPONDENT.

Case No. 16 of 1890.

(BENTON & STODDON, JJ.)

*Custom—Adoption—Sister's son—Lodi Pathans, Jullundur District.**Found, that amongst the Lodi Pathans of the Jullundur District a sonless proprietor cannot adopt his sister's son.**The parties being agriculturists were governed by custom and not by Muhammadan law.**Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 9th December 1889.*

Bates, for appellant.

The parties to this suit were Lodi Pathans of the Nakodar tahsil of the Jullundur District. The plaintiff, claiming to be the adopted son of one Bindu Khan, deceased, sued to recover the estate from the defendants, who had taken possession thereof as the natural heirs.

The parties were agriculturists, governed by custom and not by Muhammadan law.

At the first hearing of the appeal, the Court (Stoddon and Beachcroft, JJ.) directed a remand under Section 566, Civil Procedure Code, for further inquiry on the question of custom, by the following interlocutory order which was delivered by

3rd June 1891.

BEACHCROFT, J.—The plaintiff, who is a Lodi Pathan of the Nakodar tahsil, Jullundur District, sues as the adopted son of the late Bindu Khan, to recover the estate from the defendants, who have possessed themselves of it as the natural heirs of Bindu Khan.

The defendants deny both the factum and the validity of this adoption.

It is, however, fairly well established, first, by a deed, which was undoubtedly executed as far back as 4th June 1880, declaring that Bindu Khan had adopted Nanddar Khan, and also by oral evidence. Although the witnesses differ a good deal in the dates assigned by each to the day of the adoption, yet this is perhaps not a sufficient reason for rejecting their evidence

altogether. The deed shows the intention most clearly, and the oral evidence supports the deed by showing that the plaintiff did live with the late Bindu Khan for a considerable portion of his life.

At the last hearing, the *Rivaj-i-am* and the *Wajib-ul-arz* were called for. The latter document refers to the former. In the Nakodar tahsil, to which the parties belong, there is no special reference to these Lodi Pathans, who are classed with a miscellaneous collection of tribes. Their custom is said to be the same as those of the Hindu Jats, i. e. if a man has neither sons, grandsons, nor great-grandsons, he cannot adopt a daughter's son, though he may any collateral, first, those who are nearly related, and, in default of them, those who are distantly related. Another clause clearly says sister's sons and daughter's sons cannot be adopted.

In the *Rivaj-i-am* of the Jullundur tahsil, it is said of these Lodi Pathans that they have no custom of adoption at all. The Lodi Pathans are not mentioned at all in the Nowashar tahsil. The issue as to custom was not drawn with sufficient precision by the first Court, nor was there a satisfactory inquiry made: we consider it necessary, therefore, to remand this case to the first Court under Section 566, Civil Procedure Code, for an inquiry "whether amongst the Lodi Pathans of the Jullundur District a sonless proprietor can adopt his sister's son."

If there have been any cases decided in Court upon the point, they should be forwarded with the return. If other instances are quoted, they should be supported by the best evidence available, e. g., that of the collaterals who were prejudiced by such adoption, or copies of mutations, &c., &c.

Upon a return being made to the order of remand, the judgment of the Court was delivered by

STODDON, J.—The finding of the Court of first instance on the issue referred to it for trial by order of this Court, dated 3rd June last, is that among Lodi Pathans of the Jullundur District a sonless proprietor cannot adopt his sister's son. This finding is against respondent, but he has not presented any memorandum of objections to it under Section 567, Civil Procedure Code. 4th Novr. 1891.

The parties are agriculturists who are governed by custom and not by Muhammadan law. There is therefore a presumption

that the custom of adoption of a collateral kinsman obtains amongst them, notwithstanding the fact that they belong to a tribe of Pathans, the members of which have always professed the Muhammadan religion, and are not converts from Hinduism. This presumption is, however, considerably weakened by the fact that the *Riwaj-i-am* of the Jullundur tahsil expressly states that the custom of adoption does not obtain among them, and also by the fact that there is no authentic instance of an adoption of any sort having taken place. In any case, we do not consider that the presumption can be extended to the case of an adoption of a sister's son, which stands on a very different footing from that of a collateral; and we may note that though the *Riwaj-i-am* of the Nakodar tahsil states that the customs of various tribes in which the Lodi Pathans appear to be included are similar to these of the Hindu Jats, among whom the custom of adoption undoubtedly obtains, it expressly provides that the sons of daughters and sisters cannot be adopted. For the above reasons, we accept this appeal with costs throughout, and restore the decree of the first Court dismissing the suit.

Appeal allowed.

No. 22.

**GHULAM HASAIN & HASSAN,—(PLAINTIFFS),—
APPELLANTS,**

APPELLATE SIDE. {

Versus

SAHIB DIN,—(DEFENDANT),—RESPONDENT.

Case No. 375 of 1890.

(STOGDON & BEACHCROFT, JJ.).

Custom—Alienation—Tarkhans of the Jhelum District—Gift by sonless man to one heir without consent of the others.

Found, that by the custom governing Tarkhans in the Jhelum District, a sonless man is competent to make a gift of ancestral immoveable property to one heir without the consent of the rest, the heirs being a brother and another brother's sons.

Punjab Record, No. 109 of 1881 and No. 34 of 1883, referred to.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 14th February 1890.

Ishwar Das, for respondent.

The parties to this suit were Tarkhans of the Jhelum District. The claim was to set aside a gift to another heir, by

one out of three sons, of his one-third share in a right of occupancy which had devolved from the father upon his sons.

At the first hearing of the appeal, the Court (Plowden and Roe, JJ.) directed a remand, under Section 566, Civil Procedure Code, for further inquiry, whether by custom a sonless man was competent to make a gift of ancestral immoveable property to one heir without the consent of the rest, the heirs being a brother and another brother's sons. The order of remand was delivered as follows by

Plowden, J.—This is a suit among Tarkhans in the Jhelum District. 7th Feby. 1891.

One Jamil Muhammad had three sons,—Mauj Din, Ilm Din and Sahib Din,—of whom Mauj Din died without male issue in November 1888.

The sons of Ilm Din are plaintiffs, and Sahib Din, defendant.

The claim is to set aside a gift by Mauj Din of his one-third share in a right of occupancy which devolved from Jamil Muhammad upon his sons.

The plaint attacked the gift on numerous grounds,—that Mauj Din was sick and out of his senses ; that it was made in the absence of the plaintiffs and without their consent ; and that, as the right of occupancy was under Section 6 of the Punjab Tenancy Act, the landlord's assent was essential and was not given.

That the gift was made and *dakhil kharij* was granted in February 1887 is beyond dispute, and two Courts have found that the donor was in possession of his faculties.

The other main point in the case, therefore, was whether the donor was competent to make the gift ?

The first Court found that the consent of the landlord was necessary, and that without it the gift was not valid.

The Divisional Judge found that no issue as to custom had been raised, because there was no objection that by custom Mauj Din could not make a gift.

The Divisional Judge, overlooking the fact that the deed was made before the Tenancy Act of 1887 came into force, applied Section 56 of that Act, interpreting it by the construction put by this Court in No. 109 of *Punjab Record*, 1881, on Section 34 of the Tenancy Act of 1868.

He therefore upheld the gift, and the plaintiffs have appealed.

Now it must first be pointed out that Section 34 of the Tenancy Act, 1868, and the decision quoted do not affect the real question in this case.

There is no question here of a gift by an occupancy tenant of his holding, as in No. 109 of *Punjab Record*, 1881, where the occupancy tenant made a gift of his holding to his daughter's son, and a collateral questioned the gift successfully in the lower Court on the ground that the consent of the landlord was requisite under Section 34 of the Tenancy Act, 1868, and had not been given. This Court ruled that his consent was immaterial as between the tenant and a third person, and directed an inquiry as to the donor's competency to make the gift by custom.

The correctness of the decree in this case seems open to question if the second point should again arise,—for the power of an occupancy tenant to alienate his tenancy is based, not upon custom, but upon Statute, and this decision is prior to the Full Bench Judgment in No. 34 of *Punjab Record*, 1883, where the similar question of the effect of custom upon inheritance was considered. But this is not an instance of alienation of a right of occupancy. Here no question arises between the landlord and the tenant, that is to say, the persons who collectively constituted at the time of the gift and constitute now the occupancy tenant.

The question here is between these persons alone, and is whether, on the death of Mauj Din, his share in the land, the subject of the right, devolved upon the plaintiffs and the defendant, or had, by the act of Mauj Din in giving it to the defendant, passed to the latter alone. The landlord is not affected by this question.

There is no doubt that but for the gift the share of Mauj Din would have passed on his death to the plaintiffs and the defendant jointly, and the question is whether the gift by Mauj Din, on which the defendants rely as their title, is valid. This depends upon the general question "whether, by the custom governing the parties, a sonless man is competent to make a gift of ancestral immoveable property to one heir

“without the consent of the rest, the heirs being a brother and another brother’s sons.”

The gift was clearly attacked upon the ground of want of consent of the plaintiffs, and the issue—“Was the gift valid? Was or was not the deceased competent to make the gift?”—was too indefinite. Nothing has been alleged or done by the plaintiffs that amounts to an admission that the gift is valid according to custom.

We send the issue above stated to the first Court for inquiry. The evidence and opinion of the first Court to be returned direct to this Court under Section 566, Civil Procedure Code.

Upon a return being made to the above order of remand, the judgment of the Court was delivered by

STODDON, J.—The only issue left for decision by this Court's 22nd July 1891. order of 7th February 1891 was whether, by the custom governing the parties, a sonless man is competent to make a gift of ancestral immoveable property to one heir without the consent of the rest, the heirs being a brother and another brother's sons.

The return of the first Court, to which no written objections have been filed, nor verbal objections of any weight put forward in argument, is in favour of the power to gift under the above mentioned circumstances. The parties are Tarkhans of village Malot, Zilla Jhelum, but are said to be governed by customs similar to those of Gukkars. The Gukkars' *Riwaj-i-am* gives a full power of disposition in similar circumstances if followed by possession. Even the plaintiffs' own witnesses speak of this power as existing generally, only alleging that tenants of occupancy holdings under Section 6 of the old Tenancy Act cannot so gift. One case has also been sent up in which a gift of a part of a holding by a Tarkhan of this village to one son to the prejudice of other sons was upheld in Court.

In such cases it is for the plaintiff to prove that the gift is invalid by custom, which he has certainly failed to do.

We therefore dismiss this appeal with costs.

Appeal dismissed.

No. 23.

SANDAL KHAN AND OTHERS,—(DEFENDANTS),—
APPELLANTS.

APPELLATE SIDE. {

Versus

MUSSAMMAT AKKI,—(PLAINTIFF),—RESPONDENT.

Case No. 449 of 1890.

(BENTON AND STOGDON, JJ.)

Custom—Succession—Widow of son who has predeceased his father—Muhammadan Gorewaha Rajputs, Garshankar tahsil, Hoshiarpur District.

Found, that among Muhammadan Gorewaha Rajputs of the Garshankar tahsil, Hoshiarpur District, the widow of a man who predeceased his father succeeds by custom on the father's death to the estate to which her husband would have succeeded if he had survived his father,—the succession being to the usual widow's estate without power of alienation except for valid necessity.

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Hoshiarpur, dated 20th February 1890.

Morton, for appellants.

P. C. Chatterjee, for respondent.

The parties to this suit were Muhammadan Gorewaha Rajputs of the Garshankar tahsil of the Hoshiarpur District. The only question for decision in the appeal was as to the custom of the tribe on the following point:—Does the widow of a man who predeceased his father succeed on the father's death to the estate which her husband would have taken if he had survived his father ?

The enquiry on this point being meagre, the Court (Stogdon and Beachcroft, JJ.) directed a remand under Section 566, Civil Procedure Code, for further investigation by the following judgment.

9th June 1891.

STOGDON, J. (BEACHCROFT, J., concurring).

Khuda Bakhsh married to Mussammat Nur Bhari.

Sher Jang married to Mussammat Akki.

Sher Jang predeceased his father Khuda Bakhsh, on whose death, in 1886, mutation was made in favour of the two widows Mussammats Nur Bhari and Akki. The former has now died, and the question is whether Mussammat Akki is to get the half of the estate in which she held a life interest, or the nephews of Khuda Bakhsh. The first Court dismissed Mussammat

Akki's suit, but the Divisional Judge passed a decree in her favour, principally on the strength of *Punjab Record* No. 177 of 1839. That ruling refers, however, to the right of widows to represent their husbands, who have succeeded to the paternal estate, for the purposes of collateral succession, and it is only in point to a partial extent.

The inquiry made in the present case was a meagre one, and as the point is one of considerable importance, we think that further investigation is desirable. The main question is, whether among Muhammadan Gorewaha Rajputs of the Hoshiarpur District the widow of a man who predeceased his father succeeds on the father's death to the estate to which her husband would have succeeded had he survived his father. It is somewhat obscured in the present case by the fact that Khuda Bakhsh left a widow, who succeeded to half his estate, and it would be as well to search for as many instances as possible of both kinds, *viz.*, of a man leaving only a daughter-in-law and near collaterals, and of a man leaving a widow and daughter-in-law and near collaterals, and to ascertain what happened (a) on the man's death in both instances, and (b) on the death of his widow in the latter instance. The fullest possible inquiry should be made. Return within three months through Divisional Judge, who is requested to give his opinion.

Upon a return being made to the above order of remand, the final judgment of the Court was delivered by

SROGDON, J.—A return has been made to the order of this Court dated 9th June last. A very full inquiry has been made by the Munsif of Garhshankar, which is the only tahsil of the Hoshiarpur District in which Gorewaha Rajputs are to be found. He finds, on the main question, that among Muhammadan Gorewaha Rajputs, the widow of a man who predeceased his father succeeds on the father's death to the estate to which her husband would have succeeded if he had survived his father. The succession is to the usual widow's estate without power to alienate except for valid necessity. The finding is supported by many instances, and is concurred in both by the Subordinate Judge and the Divisional Judge. No memorandum of objections to it has been presented, and appellants' counsel is not prepared to contest it. After perusal of the return, we are of opinion that it is amply justified by the evidence. We therefore dismiss this appeal with costs.

7th Decr. 1891.

Appeal dismissed.

No. 24.

APPELLATE SIDE. } RAJA NAND & OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
ASA RAM,—(DEFENDANT),—RESPONDENT.

Case No. 399 of 1890.

(BENTON & STOGDON, JJ.).

Custom—Alienation—Gift in presence of collaterals—Brahmins of Mauza Bupka, tahsil Jagadhri.

Found, in a suit the parties to which were Brahmins of Mauza Bupka in the Jagadhri tahsil of the Umballa District, that an alienation by way of gift was invalid in the presence of collaterals.

Further appeal from the decree of T. Roberts Esquire, Divisional Judge, Umballa, dated 17th December 1889.

P. C. Chatterjee, for appellants.

Sham Lal, for respondent.

This was a suit for possession of 159 bigas 10 biswas and 10 biswansis of land in the village of Bupka in the Jagadhri tahsil of the Umballa District.

At the first hearing of the appeal, the Court (Stogdon and Beachcroft, JJ.) directed a remand under Section 566, Civil Procedure Code, for further inquiry into the question of custom by the following interlocutory order which was delivered by

15th July 1891.

BEACHCROFT, J.—Before proceeding to a final decision of this appeal, we consider it necessary to remand the case under Section 566 for a further inquiry upon two points.

The first is as to the nature of the property in dispute. From the account of the way that this village was founded, it is clear that the estate is not ancestral, in the sense that it ever belonged to the alleged common ancestor of the parties, Sarba Sukh.

Apparently, Santo Ram, grandfather of the plaintiff Raja Nand, came to the village, and, with the assistance of some Kambohs, brought some land under cultivation. We should like to have an inquiry made as to how Jaishi Ram acquired land in the village.

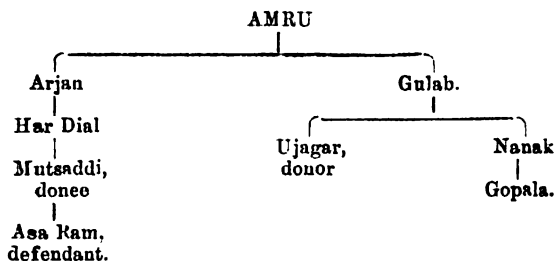
The other point which requires further elucidation is the power of Ujagar Singh to alienate. To throw light upon this point, we should like an inquiry made into the history and tenure of this village, so as to show whether the proprietors

are a collection of disconnected units or not, and we should further like to know whether alienations have been frequent in the village, and, if so, whether they have been contested and with what results.

We remand the case under Section 566 to the first Court for inquiry and finding on the points indicated.

Upon a return being made to the above order of remand, the final judgment of the Court was delivered by

STODDON, J.—The further inquiry directed by this Court *1st March 1892.* by its order of the 15th July last has now been made. The finding on the points sent down is that Jaishi Ram founded the village jointly with his cousin Santo Ram, and that alienation by way of gift to a stranger is contrary to custom. In the present case, Ujagar Singh's donee, Mutsaddi, father of Asa Ram, defendant, was descended from the same common ancestor as his donor, the pedigree being as follows :—



There appears, however, to be no reasonable doubt that Ujagar's father, Gulab, was adopted by his father-in-law, Jaishi Ram, in such a way as to transplant him from his own family into that of Jaishi Ram. At this distance of time, it is impossible for plaintiffs to prove that there was a regular formal adoption; but they have proved several admissions made by Gopala, Ujagar and Asa Ram, that plaintiffs were their collaterals, and under the circumstances there could hardly be better proof of the alleged adoption. As far back as the 28th June 1880, Gopala and Ujagar described Arja Nand as their collateral relative in a power of attorney executed by them in his favour, and on the 4th February 1880, they stated that they wished him to be appointed lambardar in the place of Ujagar's brother Bahadar, because he was young, strong, and their relative. On the 25th September 1888, Asa Ram, defendant, admitted that Gulab was Jaishi Ram's adopted son; but as he was very young at the time, his admission is not entitled to

much value. The admissions of Ujagar and Gopala are, however, entitled to great weight. Possibly the adoption was not made with all the forms and ceremonies prescribed by Hindu law, and the status of Gulab may have been more that of a resident son-in-law than that of a formally adopted son; but we think there cannot be any reasonable doubt that he and his descendants were transferred from their natural family into that of their adoptive father.

The land in dispute is not ancestral land in the sense that it was acquired by Sarba Sukh, the common ancestor of Santo Ram and Jaishi Ram. It was acquired jointly by Santo Ram and Jaishi Ram. The *wajib-ul-arz* of the village, however, does not allow gifts to strangers in the presence of collaterals, and although there have been alienations by sale or mortgage among the Kambohs, there have been none among the Brahmins. Two alienations by gift have been cited among the Kambohs. One apparently fell through, and in the case of the other it is said that there were no collaterals to contest it. No case of gift has hitherto occurred among the Brahmins. There is not such a presumption against the alienation of acquired as there is against that of ancestral property; but as the *wajib-ul-arz* is against alienation by way of gift, and does not make any distinction between ancestral and acquired property, and plaintiffs are the heirs of Ujagar, we think that they were entitled to contest the alienation, and defendant has certainly failed to establish its validity. We therefore accept this appeal and give plaintiffs a decree against defendant for possession of the land in suit, with costs throughout.

Appeal allowed.

— — —
No. 25.

APPELLATE SIDE. { MAM CHAND,—(DEFENDANT),—APPELLANT,
Versus
DAYA RAM & OTHERS,—(PLAINTIFFS),—RESPONDENTS.
Case No. 951 of 1890.
(FRIZELLE & RIVAZ, JJ.).

Custom—Alienation—Gift to stranger in presence of nephews—Gathwal Jats, Delhi District.

Found, that by the custom of the Gathwal Jats of the Delhi District, a gift to a stranger of ancestral land in the presence of nephews is invalid

Further appeal from the decree of R. L. Harris Esquire, Divisional Judge, Delhi, dated 25th April 1890.

Oertel, for appellant.

Madan Gopal, for respondents.

The parties to this suit were Gathwal Jats of the Delhi District, and the sole question for disposal was whether by custom a gift to a stranger of ancestral land in the presence of nephews was valid or otherwise.

The inquiry into custom being imperfect, the Chief Court (Roe and Rivaz, JJ.) directed a remand under Section 566, Civil Procedure Code, for further investigation by the following interlocutory order which was delivered by

Roe, J.—The counsel for appellant does not press the grounds of appeal relating to the form of the decree. 4th June 1891.

On the merits, the questions before us are—

- (1) Was Mam Chaud adopted by Ammi Lal, and, if so, was the adoption valid by custom ?
- (2) Is the gift in his favour valid by custom ?

Both Courts concur in finding that there was in fact no adoption, and after reading the evidence and hearing the counsel for appellant, we see no reason for differing from this finding.

On the question of custom, whether, in the presence of nephews, a gift of ancestral land to a stranger is valid or not, there has really been no inquiry. It appears that the village belongs to a tribe of Jats, Gathwals, and is surrounded by other Jat villages ; the proprietors are all descendants of a common ancestor and there has been no introduction of strangers in any way into the proprietary body. The presumption is certainly against the validity of the gift, and the validity is certainly not established by the evidence on the record. But this evidence is practically nil: the case has really been fought on the question of the adoption. No doubt the question of custom as regards the gift was also placed in issue, and defendant cannot claim as of right any further opportunity of producing evidence. But we are unwilling to lay down a ruling as to custom which will be taken as authoritative without full inquiry, and this has not yet been made. The record of the first Settlement says (clause 10) that proprietors may sell or mortgage their land to pay arrears of Government revenue or for their own expenses

(*tasarruf sati*) but it is silent as to gifts. No extract from the *Riwaj-i-am* has been placed on the record, nor is that document quoted at all.

Under these circumstances, we remand the case to the first Court under Section 566, Civil Procedure Code, for further inquiry as to whether, by the custom of the Gathwal Jats of the Delhi District, a gift to a stranger of ancestral land in the presence of nephews is valid or not.

The evidence taken should be returned with a finding, through the Divisional Judge, who in forwarding it will add his own opinion. The *Riwaj-i-am* should also be sent up.

Upon a return being made to the above order of remand, the final judgment of the Court was delivered by

16th Decr. 1891.

RIVAZ, J.—A return has now been made to the Court's order of the 4th June 1891, and is to the effect that the defendants have entirely failed to prove that the gift in question is in accordance with the custom of the parties.

No objections have been filed to the return, and Mr. Oertel admits that he cannot impeach the finding of the Courts below, except on the ground that the burden of proof should have been placed on the plaintiffs. We are of opinion that the onus was clearly on the defendant, and we therefore dismiss the appeal with costs.

Appeal dismissed.

NO. 26.

GURDITTA MAL,—(PLAINTIFF),—PETITIONER,

Versus

PAL SINGH AND OTHERS—(DEFENDANTS),—
RESPONDENTS.

Case No. 1428 of 1890.

(RIVAZ & STODDON, JJ.)

Limitation Act, 1877, Schedule II, Articles 66, 67, 68 and 80—Single bond.

Material irregularity—Grounds for revision.

The intention of the Limitation Act is to contrast a "single" or unconditional bond (Article 66, 67) with a bond "subject to a condition" (Article 68).

A "single" bond means a simple bond without alternative conditions, or penalty attached,—an absolute engagement in writing for the payment of money. (*Punjab Record*, No. 138 of 1890, followed).

APPELLATE SIDE. {

It is a material irregularity and forms a ground for revision when the lower Courts act upon a misrepresentation of a fact apparent upon the record, or the erroneous assumption of a fact, on the application of a rule, or a failure to appreciate the true points for determination raised by a general issue, such as one of *res judicata* or limitation, when such irregularity results in the dismissal of a suit on a technical ground, apart from the merits, which can be shown to be erroneous. *Punjab Record*, No. 105 of 1888, Nos. 42, 130 and 206 of 1889, Nos. 6 and 108 of 1890, and Nos. 60 and 65 of 1891, referred to.

Petition for revision under Section 622, Civil Procedure Code, of the decree of T. O. Wilkinson Esquire, Divisional Judge, Amritsar, dated 2nd June 1890.

Madan Gopal, for petitioner.

Higgins, for respondents.

The plaintiff sued upon a bond for Rs. 400; his suit was dismissed by the Court of first instance, and the decree was upheld on appeal to the Divisional Judge, both Courts holding that the suit was barred by limitation.

The plaintiff then moved the Chief Court on the revision side. The judgment of the Chief Court on the question whether an application for revision would lie under Section 622, Civil Procedure Code, was delivered by

RIVAZ, J.—This is a suit upon a bond which has been *5th Feby. 1892.* dismissed by both the lower Courts as time barred, and the plaintiff has applied to this Court for revision. The bond is for Rs. 400, and the defendant, the obligor, agrees by its terms to pay the equivalent of this amount with interest at the kharif of Sambat 1943 in grain, i.e., in kind, and in case of default to pay the full amount with interest to date in cash on demand. The bond, which is unregistered, is dated 21st June 1886, and the suit was filed on the 29th October 1889. The lower Courts concur in holding that the suit is governed as regards limitation by Article 67 of the second Schedule of the Limitation Act, and is, therefore, barred by limitation. It is contended that the Courts have acted with material irregularity in coming to this decision, and I think that there is ground for this contention.

It is conceded by the petitioner's counsel that a merely erroneous decision does not of itself afford reason for interference under Section 622 of the Civil Procedure Code, and this much at least may be taken to have been settled by the decision of their Lordships of the Privy Council in *Amir Hassan*

Khan v. Sheo Bakhsh Singh (I. L. R., 11 Calc., 6), referred to and confirmed in *Muhammad Yusuf Khan v. Abdul Rahman Khan* (I. L. R., 16 Calc., 749). But it is urged that a Court in the exercise of its jurisdiction may act with material irregularity in arriving at a wrong decision upon a question of law, and that this is what has occurred in the present case. The argument is somewhat as follows: the Court in deciding the issue whether or no the claim was within limitation had to consider what article of the second Schedule of the Limitation Act was applicable. To arrive at a conclusion upon this point, it was first necessary to consider under what description of bond the instrument in suit fell. Was it a single bond (Articles 66, 67); a bond subject to a condition (Article 68); an instalment bond (Articles 74, 75), or a bond not expressly provided for (Article 80)? Whereas the Court, in fact, began with the assumption that the bond was a single bond, and only gave its judicial mind to a consideration of the one question, whether or no a day was specified for payment. And whereas, further, the bond on the face of it is not a single bond, but is either a bond subject to a condition, or not otherwise provided for.

Now I think there is ample authority in the published rulings of this Court for holding that the misrepresentation of a fact apparent upon the record, or the erroneous assumption of a fact, or the applicability of a rule, or a failure to appreciate the true points for determination raised by a general issue, such as one of *res judicata* or limitation, are irregularities which may be material, and that the irregularity is material when it results in the dismissal of a suit on a technical ground, apart from the merits, which can be shown to be erroneous, see especially Civil Judgments Nos. 105, *Punjab Record* of 1888, and 42, 130, 206, *Punjab Record* of 1889. Compare Civil Judgments Nos. 6, 108, *Punjab Record* of 1890, and Nos. 60, 65, *Punjab Record* of 1891. By way of further illustration I might refer to *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (I. L. R., 15 Calc., 47), *Bhashyam v. Jayaram* (I. L. R., 11, Mad., 303), *Manisha Eradi v. Siyali Koya*, *ibid*, 220), and *Venkubhai v. Lakshman Venkoba Khot* (I. L. R., 12 Bom., 617). The last cited case is especially in point. In my opinion, the present case falls within the principle of the decisions cited, and may be considered on revision. But I would be careful again to note that the material irregularity consist

in my opinion, not in any erroneous finding that the bond is a single bond, or that no day for payment is specified, but in the omission to consider whether the instrument is a single bond, though the consideration of this point was necessarily involved in the issue of limitation raised in the case.

It becomes, therefore, necessary to decide whether the petitioner has established his contention that the bond in suit is not a single bond, and that, therefore, neither Article 66 nor Article 67 of the second Schedule of the Limitation Act applies, and the suit is therefore in time, either under Article 68 or Article 80, and if this is made out to pass such order in the case as seems fit. It appears to me that Civil Judgment No. 138, *Punjab Record* of 1890, is sufficient authority for holding that the bond in the present case is not a single bond. Without applying the strict technical meaning which the expression "single bond" bears in the English law, I think the clear intention of the Limitation Act is to contrast a "single" or unconditional bond (Articles 66, 67) with a bond, "subject to a condition" (Article 68). Whether the "condition" contemplated by Article 68 is confined to a condition of the nature referred to in the definition of "bond" in Section 3 of the Limitation Act, need not, I think, be decided in the present case. All that need be positively decided is that a "single" bond means a simple bond without alternative conditions, or penalty attached,—an absolute engagement in writing for the payment of money. The bond in the present suit, as was also the case in No. 138, *Punjab Record* of 1890, is something more than this, and is, therefore, not a "single" bond, and for the reasons stated in the case just cited, the suit is governed either by Article 68 or Article 80, and under either view is within time.

I would allow this application and direct the first Court to dispose of the suit upon the merits.

The stamp on this application to be refunded, and other costs to be costs in the cause.

STODDON, J.—I concur.

1st Feby. 1892.

Application allowed.

No. 27.

REFERENCE SIDE. {

BUDHU,—(PLAINTIFF),—APPELLANT,

Versus

HIRA & OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 1 of 1892.

(ROE & RIVAZ, JJ).

Sale in execution of decrees—Absence of certificate of sale—Suit by purchaser—Title against party to the suit or his representative in interest.

The plaintiff sued, alleging that he was the purchaser of a house at an execution sale following decree against B., defendant 2, on account of a debt due from B.'s deceased husband. The defendant 1 was B.'s second husband, and defendant 3 her son. The plaintiff could produce no certificate of sale.

Held that the non-production of a certificate was not fatal to the plaintiff's claim.

When the plaintiff is suing to eject not a third party, but the very person who was a party to the suit which led to the execution sale, or persons whose interests are identical with such party, the mere omission to produce a certificate of sale is not fatal to the success of the suit. A party to the suit, or his representative in interest, cannot, after the sale has been confirmed, dispute the purchaser's title, as the order confirming the sale completes the title as against the parties to the suit.

I. L. R. 12 Bom., 589, followed.

Case referred by T. J. Kennedy Esquire, District Judge, Kangra, under Section 617, Civil Procedure Code, by order dated 16th January 1892.

This was a reference under Section 617, Civil Procedure Code, made by the District Judge, Kangra.

The point upon which doubt was entertained sufficiently appears from the judgment of the Chief Court, which was delivered by

8th March 1892.

RIVAZ, J.—It would have been better, we think, if, before making this reference, the District Judge had come to a finding upon the questions of fact involved in the case. We do not know, for instance, whether he is satisfied that the property in dispute really was bought by the plaintiff as auction purchaser at a sale in execution of a decree against the defendant Mus. sammat Bhagan. Nor do we know whether the District Judge believes the plaintiff's allegations that defendants are in fact his tenants. If they are, they obviously cannot dispute their landlord's title, merely because he has no certificate of sale (*vide* Section 116, Evidence Act).

It will be convenient, however, as the reference has been made, to answer the question referred. Plaintiff, as already observed, alleges that he is the purchaser of a house at an execution sale following a decree against Mussammat Bhagan, defendant No. 2, on account of a debt due from Mussammat Bhagan's deceased husband, Devi Ditta. Hira, defendant No. 1, is Mussammat Bhagan's second husband, and defendant No. 3 is her son. Plaintiff can produce no certificate of sale, and the question asked is whether this alone is fatal to his claim. The District Judge may, we think, be guided by the ruling in I. L. R., 12 Bom., 589, which appears to be the most recent ruling on the point, and which lays down that at least when the plaintiff is suing to eject, not a third party, but the very person who was a party to the suit which led to the execution sale, or persons whose interests are identical with such party, the mere omission to produce a certificate of sale is not fatal to the success of the suit. A party to the suit, or his representative in interest, cannot, after the sale has been confirmed, dispute the purchaser's title, as the order confirming the sale completes the title as against the parties to the suit. The decision in I. L. R., 4 Bom., 155, has not been accepted by the Bombay High Court in later decisions as laying down a rule of general applicability, and the view taken in I. L. R., 12 Bom., 589, is in accordance with several rulings of the Calcutta High Court.

Let the papers be returned.

Reference returned.

No. 28.

BADRI,—(PLAINTIFF),—APPELLANT,

Versus

KUNDAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 63 of 1891.

(RIVAZ & STODDON, JJ.)

Mortgage deed—Interest—Rights of mortgages—Charge upon mortgaged property.

Where there is a clear agreement that a mortgagor will pay interest year by year and that he will not be entitled to redeem without paying

the whole amount of the principal and interest due by him, such principal and interest form a charge upon the mortgaged property to which effect must be given.

Punjab Record, No. 57 of 1888 and No. 8 of 1890, referred to and explained.

I. L. R., 19 Calc., 19, referred to.

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 16th October 1890.

Ishwar Das, for respondent.

The only question for decision in this case was as to the period for which the plaintiff, mortgagee, was entitled to interest as a charge on the mortgaged property. The lower Appellate Court was of opinion that there was a conflict between the decisions reported as *Punjab Record*, No. 57 of 1888 and No. 8 of 1890.

The facts sufficiently appear from the judgments.

20th Feby. 1892.

STODDON, J.—On the 1st November 1878, Hazru mortgaged without possession to Badri 207 ghumaos 2 marlas of land for Rs. 700. He promised to pay a lump sum of Rs. 39 on account of yearly interest, year by year, and he was debarred from redemption unless he made payment of the whole amount of interest and principal due by him. It was further agreed that the mortgagee would not be entitled under any circumstances to obtain possession of the mortgaged property for a period of three years. After the expiration of that period, if the mortgagor failed to pay interest in any year, the mortgagee was to be entitled in that year to treat the property as mortgaged for the whole amount of principal and interest due, and to take possession of it. After taking possession, he was to enjoy the income of the land in lieu of interest. The mortgagor made default in the payment of interest from the very first. In 1890 the mortgagee sued his sons, he having died, for possession of the mortgaged property, claiming to charge upon it the principal sum of Rs. 700 and Rs. 445 interest for a period of about eleven and a half years. The District Judge found that he was entitled to interest for the first four years only, viz., up to the date upon which he was entitled to take possession of the mortgaged property. He relied principally upon a judgment of this Court published as *Punjab Record*, No. 8 of 1890.

This decision was upheld by the Divisional Judge, who noted that *Punjab Record* No. 8 of 1890 quoted with approval

Punjab Record No. 57 of 1888, though to his mind there was a conflict between the two decisions. He considered that the wording of the deed clearly denoted that the parties did not contemplate the land being charged with more than one year's interest besides that which might be due for the first three years.

The sole question in the case is whether there is a stipulation for payment of interest up till the time of the mortgagee's obtaining possession of the mortgaged property. In *Punjab Record* No. 8 of 1890 there was no such stipulation; but in the present case there is a clear agreement that the mortgagor will pay interest year by year, and that he will not be entitled to redeem without paying the whole amount of principal and interest due by him. The deed further entitles the mortgagee to take possession of the land at the end of the fourth year in default of payment of interest; but it does not compel him to do so, nor does it debar him from receiving interest for subsequent years, if he does not take possession.

For the above reasons we accept this appeal and enhance the amount charged on the property from Rs. 856, as declared by the first Court, to Rs. 1,145. Plaintiff will get his costs throughout from defendants.

RIVAZ, J.—I concur, and merely wish to add that there is no conflict between *Punjab Record* No. 8 of 1890 and *Punjab Record* No. 57 of 1888, so far as these rulings relate to the question for decision in the present case, as the Divisional Judge appears to think. The distinction between the two cases is that in the earlier decision the mortgage deed contained a provision similar to the stipulation in the present deed, for payment of interest year by year up to the date of possession being taken by the mortgagee. In *Punjab Record* No. 8 of 1890 there was no agreement to pay interest after the fixed date upon which the mortgage money was repayable, but merely an agreement to give possession to the mortgagee. It was therefore held, in the case last cited, that interest claimed after the due date could not be treated as a charge upon the property, but should be regarded as compensation for breach of the contract to deliver possession. The correctness of this view has been affirmed by subsequent decisions,—see the case at I. L. R., 19 Cal., 19, and the rulings therein cited.

22nd Feby. 1892.

Appeal allowed.

No. 29.

APPELLATE SIDE.

GOKAL AND JOWAHIR,—(PLAINTIFFS),—APPELLANTS,
Versus
 BHOLA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 1366 of 1890.

(ROE & RIVAZ, JJ).

Punjab Laws Act, Section 12, clause (d)—Construction—Suits by land-owners of patti severally.

When suits for pre-emption have been filed at different times by persons equally entitled to pre-emption under * clause (d), Section 12, Punjab Laws Act, but no decree has been obtained by any claimant before the later suit has been instituted, the general rule applicable is, not that the plaintiff who first succeeds in obtaining a decree will be entitled to retain the whole of the property, but that in the absence at least of some special bar, each claimant will be entitled to a decree for a proportionate share of the property on payment of a proportionate share of the purchase money.

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 16th October 1890.

Lal Chand, for appellants.

This suit raised the question of the true construction of clause (d), Section 12, of the Punjab Laws Act, in claims for pre-emption in villages advanced by the landowners of the *patti* or other sub-division of the village, severally.

The material portions of the section are as follows :—

Section 12. If the property to be sold or the right to redeem which is to be foreclosed is situate within, or is a share of, a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary—

- (a) first, in the case of joint undivided immovable property, to the co-sharers ;
- (b) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor ;
- (c) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the landowners of the *patti* or other sub-division of the village in which the property is situate, jointly ;

* *Section 12, clause (d).*—Fourthly, if the landowners of the *patti* or other sub-division make no joint claim to exercise such right, to such landholders severally.

- (d) fourthly, if the landowners of the *patti* or other sub-division make no joint claim to exercise such right, to such landholders severally ;
- (e) fifthly, to any landholder of the village.

* * * * *

The judgment of the Chief Court was delivered by

RIVAZ, J.—The material facts are that on the 15th Janu- 21st March 1892.

ary 1889 the three first defendants sold 41 kanals of land in Mauza Premgarh to Bhola, Lohar, defendant No. 4, for Rs. 3,500. On the 12th December, Bhola, Saini, defendant No. 5, brought a suit for pre-emption of the said land against the vendors and purchaser and obtained a decree upon the defendants' confession on the 4th March 1890. While the above suit was pending, *viz.*, on the 13th January 1890, the present suit for pre-emption of the same land was instituted by the present plaintiffs against the original vendors and the two Bholas. It is not now denied that under clause (d) of Section 12 of Act IV of 1872, the pre-emption rights of the present plaintiffs and Bhola, Saini, are equal, all three being landowners in the *patti* or sub-division in which the land is situated, while Bhola, Lohar, the original vendee, is a stranger with no rights of pre-emption. The attempt made by the plaintiffs in the lower Appellate Court to contend that their claim fell under clause (c) of Section 12 of the Act has been very rightly abandoned in this Court, and it may also be here mentioned that at no stage of the case have the defendants taken any objection to the maintenance of the present suit by the two plaintiffs, who are brothers, jointly. The claim, as laid by the present plaintiffs, was for possession of the whole of the land sold on the ground that the former suit and decree in Bhola's (No. 5) favour was collusive and merely colourable, or in the alternative for recovery of two-thirds of the land, leaving one-third with defendant No. 5. Both the lower Courts are agreed that no sufficient grounds are made out for decreeing the whole of the land in plaintiffs' favour, and this finding is undoubtedly correct. But the Courts have differed on the question whether plaintiffs can claim to purchase two-thirds of the land upon payment of two-thirds of the consideration money, and this is the matter with which we have to deal upon this further appeal. The Divisional Judge states the point in dispute as follows : "If one landholder in a village or *patti* sues for pre-emption of land sold and obtains a decree, can other landholders,

“ basing their claim like the former on Act IV of 1872, Section “ 12 (d) or (e), demand a share in the land, or is the first “ owner entitled to retain the whole by virtue of his superior “ diligence ? ” The Divisional Judge has decided that Bhola, defendant No. 5, is entitled to retain the whole bargain as he has shown superior diligence to the other landowners, whose original claims were not superior to his, but only equal. It will be observed that Bhola did not obtain his decree for pre-emption till after the present suit had been filed, and that his superior diligence therefore merely consisted in lodging his claim a month before the plaintiffs instituted their suit.

Several rulings of this Court were cited both before us and in the lower Courts, as supporting either side's contentions, but many of the cases quoted are not strictly in point. Those, for instance, which proceed upon the penultimate clause of Section 12 of the Laws Act, have no special bearing in defendants' favour, as the election of the vendor alluded to in that clause is clearly one which can only be exercised once for all at the time of the original sale, and not afterwards ; and though it has been ruled that a vendee may re-sell to a pre-emptor in recognition of his superior claims, which sale will hold good as against future claimants with rights superior to that of the original vendee, but inferior to that of the subsequent purchaser, there appears to be no authority for the position that a subsequent sale, either privately arranged, or decreed by the Court, necessarily bars the rights of other pre-emptors equally entitled with the last purchaser or decree-holder, especially in a case where the said pre-emptors have instituted their suit before the earlier claimant has perfected his title by obtaining a decree or otherwise.

Of the cases most directly in point, Civil Judgment No. 20, *Punjab Record* of 1881, and the decisions of the Allahabad High Court reported in I. L. R., 1 All., 291 ; 6 All., 370 ; and 7 All., 720, favour the view (which appears to coincide with the Muhammadan Law on the subject) that where there is a plurality of persons equally entitled to pre-emption, the right of all is equal, and the shares are divided *per capita* and without regard to the extent of the several properties of the claimants : (see 3 W. R., 71, citing the *Hidaya, Book 38, Chapter I, 566). On the other hand, the cases reported as Civil Judgments No. 102, *Punjab Record* of 1881, and No. 83, *Punjab Record* of 1888, have

* Grady, 2nd edition, 549.

been relied upon as instances where one of two persons with equal rights of pre-emption has been found entitled to retain the whole property by reason of his superior diligence in coming into Court and obtaining a decree. The last cited authorities are, however, it should be observed, cases of pre-emption of houses in towns based upon Section 11 of the Act, and in the earlier case at least, which was careful to distinguish No. 20 *Punjab Record* of 1881, as being a claim to land in a village under Section 12, very special circumstances existed for giving the preference as regards the whole of the property to the first claimant.

It seems to us clear that the cases, taken collectively, do not lay down any general broad proposition that when one of several persons equally entitled to pre-emption shows greater diligence than the others in prosecuting his claim, he is solely on this ground entitled to retain the whole property against all subsequent and less diligent claimants. And we should regret to have to affirm any such general proposition, as its effect would probably be to raise all sorts of difficult questions as to the true meaning of superior diligence, and would also tend to encourage an undesirable competition by rival claimants in coming into Court, each striving to jostle his opponent in the race to file his suit and establish his superior diligence.

We must therefore turn again to clause (d) of Section 12 of the Act, and decide upon the true construction of that clause how effect is to be given to the right reserved under the circumstances stated to the landholders severally. It has been ruled by this Court (Civil Judgment No. 3, *Punjab Record* of 1881) that unless the landowners of the *patti* all combine to make a joint claim under clause (c), two or more of their number cannot join in a single suit for pre-emption, such suit being open to the objection that in it different plaintiffs have combined distinct causes of action. If this view be correct, it seems to us all the more necessary to protect the interests of the individual landowners severally entitled under clause (d) by refraining, if possible, from laying down any rule, which would enable one landholder to monopolize all the other landholders' rights merely by using greater activity in launching his suit for the clause itself gives no indication that rights are to be won or lost in this fashion. It seems to us, therefore, both reasonable and consistent with the true scope of the section, to hold that when, as in the present case, suits for pre-emption

have been filed at different times by persons equally entitled to pre-emption under clause (d), but no decree has been obtained by any claimant before the later suit has been filed: the general rule applicable will be, not that the plaintiff who first succeeds in obtaining a decree will be entitled to retain the whole of the property, but that, in the absence at least of some special bar, each will be entitled to a decree for a proportionate share of the property on payment of a proportionate share of the purchase money.

For the above reasons we are of opinion that the decree of the first Court was correct, and, accepting this appeal, we decree in plaintiffs' favour possession of two-thirds of the property in dispute, provided that they pay into Court within two months of the date of this order two-thirds of Rs. 3,500 *viz.* Rs. 2,333-5-4, or so much of that sum as has not already been deposited in Court: otherwise the suit to stand dismissed with costs. The decree must be *ex parte* as the respondents have not appeared.

We think that each party may fairly be ordered to pay his own costs throughout the litigation.

Appeal allowed.

No. 30.

APPELLATE SIDE. {	ALI GAUHAR AND OTHERS,—(PLAINTIFFS),— APPELLANTS,
	<i>Versus</i>
	JOWAHIR AND HIRA NAND,—(DEFENDANTS),— RESPONDENTS.

Case No. 247 of 1891.

(RIVAZ & STODDON, JJ.)

Limitation Act, 1877, Schedule II, Articles 10 and 120—Mortgage by conditional sale.—Foreclosure proceedings and suit for possession—Pre-emption.

The limitation applicable to a suit for pre-emption of an undivided share in a joint holding which does not admit of physical possession being

taken, and in which the purchaser acquires his title by foreclosure proceedings under Regulation XVII of 1806 and a subsequent suit for possession, is six years under Article 120, Schedule II of the Limitation Act, 1877, Article 10 having no application to such a state of facts.

*Further appeal from the decree of M. Macauliffe Esquire,
Divisional Judge, Sialkot, dated 30th January 1891.*

Sarbadhicary, for respondents.

This was a suit for pre-emption. The purchaser acquired his title to the property—which consisted of an undivided share in a joint holding not admitting of physical possession being taken—by foreclosure proceedings under Regulation XVII of 1806 and the usual subsequent suit for possession.

The lower Appellate Court applied Article 10 of second Schedule of the Limitation Act, 1877, and dismissed the plaintiff's suit. Upon further appeal the judgment of the Chief Court holding Article 10 to be inapplicable, was delivered by

RIVAZ, J.—The only objection taken to the present claim was that it is barred by limitation. The suit is for pre-emption. The land in suit was mortgaged by defendant No. 1 to defendant No. 2 in 1873 by a deed of conditional sale. In 1883 proceedings for foreclosure were taken under the Regulation, and when the year of grace had elapsed, *viz.*, in 1884, a suit for possession was brought by the mortgagee, which terminated on the 17th July 1884, in a consent decree, under which the sale was not to be considered absolute for the further period of four years, and only then if the mortgage debt was not paid off in the interval. It is not denied that the money was not paid, nor is it urged that the sale failed to become complete on the 18th July 1888. The suit was filed on the 16th August 1890. 29th Feby. 1892.

Article 10 of the second Schedule of the Limitation Act clearly cannot be applied to the case. The subject of the sale being an undivided share in a joint *khata* does not admit of physical possession, and there is no registered sale-deed which can afford a starting point for limitation. Article 120 must therefore be applied, as held by the first Court, and the suit being brought within six years of the 18th July 1888 is within time.

We accept the appeal and decree possession of the land in suit in plaintiffs' favour, provided that they deposit Rs. 98-8-9 (or any portion of that sum which is not already in Court) within two months of the date of this order; otherwise the suit to stand dismissed with costs.

Plaintiffs must get their costs in all the Courts.

Appeal allowed.

Full Bench.**No. 31.**

BUDHE KHAN & OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MAKHE KHAN,—(DEFENDANT),—RESPONDENT.

Case No. 4 of 1890.

(ROE, FRIZELLE & RIVAZ, JJ.)

Limitation Act, 1877, Schedule II, Article 141—Suit by Hindu or Muhammadan entitled to the possession of immoveable property on death of a female.

A. K. on 14th April 1877, executed and registered a deed of gift of his immoveable property to his sister's son, possession being given.

A. K. died in 1882.

A. K. left a widow him surviving, who died in 1888 without having, apparently, ever obtained possession of her husband's property.

In May 1890 the collaterals of A. K. sued for possession of his immoveable property.

Held, by the Full Bench, that the suit was within limitation, being governed by Article 141, Schedule II, Limitation Act, 1877.

Whatever may be the exact scope of this Article, it is clearly applicable to the case of a plaintiff claiming a childless owner's estate on the death of his widow in spite of an alienation made by the male owner, at least where twelve years have not elapsed between the said alienation and the owner's death or that of his widow.

[*Cf. Punjab Record*; Nos. 10 and 116 of 1890.]

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 18th October 1890.

Oertel, for appellants.

P. C. Chatterjee; for respondent.

This was a reference to a Full Bench, under Section 11, Punjab Courts Act, 1884, for a decision as to the scope and construction of Article 141, Schedule II, Limitation Act, 1877, which is as follows :—

141. Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.

12 years ...

When the female dies.

The facts sufficiently appear from the order of reference, which was as follows :—

2nd April 1892.

RIVAZ, J. (BENTON, J., concurring).—We think it desirable, without any expression of our own opinion upon the point involved, to refer for the opinion of a Full Bench the question whether the present suit is barred by the law of Limitation.

The only facts which need be stated are that the suit is one by the collateral relations of one Aya Khan for possession of ancestral immoveable property which Aya Khan gifted to one Shahbaz Khan (who is represented by the present defendant) on the 14th April 1877. Aya Khan is said to have died eight years before suit, or about 1882. He left a widow who died about one-and-half years before suit. The suit was filed in May 1890, that is more than twelve years after the date of the gift, but within twelve years of the date of the deaths of both Aya Khan and his widow.

The case is similar to that reported as No. 10 *Punjab Record* for 1890, but there is this distinction that the childless proprietor in the present case left a widow him surviving, which was not the fact in the above cited case. The Full Bench decision, No. 116, *Punjab Record*, 1890, is not strictly in point, as it left open the particular question which arises in the present case.

An analogous point to that which we are now referring is pending before a Full Bench owing to the difference of opinion of the learned Judges in No. 608 of 1890. This case should be disposed of along with No. 608.

The opinion of the Full Bench was delivered as follows by
9th April 1892. RIVAZ, J.—The question referred for the opinion of the Full Bench is whether the plaintiff's suit is barred by the law of Limitation.

The suit is by the collateral heirs of one Aya Khan, deceased, for possession of his immoveable property. Aya Khan, on the 14th April 1877, made a gift of the said property by registered deed to his sister's son, Shahbaz Khan, the father of the present defendant. We see no reason to doubt that this gift was accompanied, or almost immediately followed, by the actual possession of the donee, and this was apparently the view of the lower Courts, though they have recorded no distinct finding upon the point. Aya Khan may be taken to have died sometime in 1882, as alleged by the plaintiffs. Defendant's allega-

tion, that Aya Khan died almost immediately after executing the deed of gift, is not borne out by the record, but even if the fact is as defendants assert, it will not assist their case upon the issue of limitation, as will presently appear. Aya Khan left a widow surviving him, who is stated by the plaintiffs to have died sometime in 1888, and this allegation has not been questioned by the defendant. Probably the widow never held possession of her husband's property, as it would appear that the donee, Shahbaz Khan, was in possession till his death in or about 1887, and was then succeeded by his son, the present defendant. The suit was filed in May 1890.

The plaintiffs contend that, on the above facts, the suit is governed as regards limitation by Article 141 of the Second Schedule of the Limitation Act, and is, therefore, within time, and in our opinion this contention must prevail.

Whatever may be the exact scope of the above Article, as to which there is some conflict among the published authorities, we think that it is clearly applicable to the case of a plaintiff claiming a childless owner's estate on the death of his widow, in spite of an alienation made by the male owner, at least where twelve years have not elapsed between the said alienation and the owner's death, or that of his widow. For in such case the plaintiff is, if his allegation as to the invalidity of the alienation is correct, a person entitled to possession on the death of the widow. Whether the Article applies to a case in which it can be shown that the alienee has had possession for twelve years, either before the death of the male owner or the death of his widow, is a question which we need not discuss at present, as it does not arise out of the present reference. We are of opinion that the mere fact of the widow not having entered into possession of her husband's property, but having acquiesced in her husband's act of alienation, does not of itself exclude the application of the Article, at any rate where, as in the case before us, the alienee has not held possession for a period of twelve years when the death of the widow occurs. The reversionary heir is not the less entitled to possession upon the widow's death because the widow has chosen to waive her own claim to possession. What may be the effect upon the reversioner's rights of her not making a claim until the period within which she could do so by law has elapsed is (as before stated) a question which need not now be decided.

Our reply to the reference is that, for the reasons above stated, the suit is within limitation.

The case will be returned to the Division Bench for disposal of the appeal.

No. 32.

APPELLATE SIDE.

MUSSAMMATS BANO BEGAM AND JAFRI BEGAM,—
(DEFENDANTS),—APPELLANTS,

Versus

SAYAD AHMAD ALI,—(PLAINTIFF),—RESPONDENT.

Case No. 154 of 1889.

(RIVAZ & STODDON, JJ.)

Custom—Alienation—Gifts to daughters in presence of near male collaterals—Sayads (Sunnis) of Unchagaon of Balabgarh tahsil, Delhi District.

In a suit the parties to which were Sayads (Sunnis) of the village of Unchagaon in the Balabgarh tahsil of the Delhi District, found that the defendants (two daughters), upon whom the burden of proof lay, had failed to establish that by custom (it being admitted that the daughters had no right by inheritance) a gift of ancestral land made in their favour by their father, a sonless proprietor, in the presence of male collaterals descended from the grandfather of the donor, without their consent, was valid.

Further appeal from the decree of J. A. Anderson Esquire, Divisional Judge, Delhi, dated 16th November 1888.

Fazl Din, for appellants.

Oertel, for respondent.

The parties to this suit were Sayads (Sunnis) of Unchagaon in the Balabgarh tahsil, Delhi District, and the only question for decision was as to the validity, by custom, of a gift of ancestral land by a sonless proprietor to his two daughters (the defendants) in presence of male collaterals descended from the grandfather of the donor, without their consent.

At the first hearing of the appeal, the Court (Plowden and Benton, JJ.) directed a remand for an inquiry into the question of custom by the following interlocutory order—

15th May 1890

FLOWDEN, J. (BENTON, J., concurring).—The principal question in this case is the validity of a gift of ancestral land made by a sonless proprietor to his two daughters in presence of male collaterals descended from the grandfather of the donor, without their consent.

Both lower Courts have held the gift invalid. The District Judge considered that by the ruling in case No. 107 of *Punjab Record*, 1887, the burden of proof lay on the donees against the reversioners. But that case did not profess to lay down any rule as to gifts by sonless proprietors to daughters.

The parties are Sayads of Unchagaon, in the Delhi District, and it is not disputed that the decision turns upon custom and not upon the Muhammadan law. Neither Court has seen the *Wajib-ul-arz* prepared at the first settlement, which to some extent countenances the power of a sonless proprietor to make a gift to his daughter. Without deciding how far this affects the burden of proof, we think it is desirable that there should be an investigation into the custom simultaneously with the inquiry directed in a similar case from the same village (Civil Appeal No. 142 of 1889), which has been heard and remanded to-day to the Court of the District Judge.

The case is remanded to the District Judge of Delhi for the purpose of causing an inquiry to be held into the issue laid down in Civil Appeal No. 142 of 1889,* in the manner there directed in presence of the parties to both suits. The return to be made direct to this Court.

* Case No. 142 of 1889.

(FLOWDEN & BENTON, JJ.)

Further appeal from the order of J. A. Anderson Esquire, Divisional Judge, Delhi, dated 24th November 1888.

MUSSAMMAT MURAD-UN-NISA,—(PLAINTIFF),—APPELLANT,

Versus

SHER ALI AND OTHERS,—(DEFENDANTS),—RESPONDENT.

Lakshmi Narain, for appellant.

Oertel, for respondents.

The main question in this appeal is whether a gift of ancestral land made by the sonless Azam Ali to his four daughters is or is not valid, being made without the consent of male collaterals, descended from the great-grandfather of the donor.

15th May 1890.

The parties are Sayads of Unchagaon in the Balabgarh tahsil of the Delhi District. The village tenure is incomplete *bhayachara*. The Courts have agreed that the gift is not valid, but the reasons given, especially by the first Court, are not of much weight, being in part due to the meagreness of the evidence.

In neither Court was reference made to the *Wajib-ul-arz* of this village prepared at the first settlement. In para. 10 of that document, treating of *intikal hakiyat*, it is stated that among others a daughter

Upon a return being made to the above order of remand, the judgment of the Court was delivered as follows by

16th Feby. 1892.

RIVAZ, J.—A return has now been received to this Court's order of the 15th May 1890, and has been considered.

The result tends to show that in Unchagaon (where the parties reside) and in the neighbouring town of Faridabad no evidence is forthcoming which can be held to establish any custom favouring gifts by sonless Sayad proprietors to daughters. It is admitted that no such gift has ever been attempted in Unchagaon, and further that, among the Sayads of this village, the daughter has no right by *inheritance*. In Mohina, on the other hand, and possibly also in the Sayad villages in the Gurgaon District, instances of gifts to daughters are forth-

receives no share in any way, but she can receive one if the proprietor during his lifetime makes a gift to her, or executes in writing (*hiba karjai ya dastawez karjai to mile sakta hai*).

A *Riwaj-i-am* prepared at the second settlement in 1878 throws no direct light upon the question. The only positive evidence of such a gift is by hearsay of an old gift, and of a recent gift by one Abid Ali, which is being contested. No instance is mentioned in the *Wajih-ul-arz* in support of the entry above quoted.

It appears, however, that there are four other villages of Sayads in the Delhi District, and it is desirable to investigate the question of custom involved in this case, and in the case relating to the gift by Abid Ali, where a similar question arises.

Before deciding this appeal, we think it desirable that an inquiry should be made into the following issue—

By local custom of the Sayad tribe, is a gift of ancestral land by a sonless proprietor to a daughter in the presence of male collaterals descended from the grandfather or great-grandfather of the donor valid or invalid when made without their consent?

We put the issue in this form to cover the facts of the cognate case (No. 154 of 1889), and as we think one inquiry should be sufficient for both cases, we remand the case to the Court of the District Judge of Delhi. Evidence can be taken on the spot by a Commissioner in the four Sayad villages of the district, *viz.*, Faridabad and Mohina in the Delhi tahsil and Rasulpur and Sultanpur in the Palwal tahsil, in the presence of all parties concerned in both suits, and a single return be made direct to this Court with the opinion of the District Judge on the evidence. It will be noted that, by the form of the issue, the question of the burden of proof is left open.

[NOTE.—This appeal was eventually dismissed for default on the 25th June 1891.]

coming, but, as pointed out by Mr. Clifford, the Sayads of these villages are Shias, and, moreover, appear to recognize some right of succession among daughters, whereas the contrary rule (as just stated) prevails among the Sayads of Unchagaon, who are, moreover, Sunnis.

Neither the *Wajib-ul-arz* of Mauza Unchagaon, nor the *Riccoj-i-am* of the Delhi District affords much assistance in deciding the present issue, but we would note that we can find no provision in favour of the validity of a gift to daughters such as that alluded to in the remand order. Paragraph 10 of the *Wajib-ul-arz* appears to have been misread at the previous hearing, the words "lepalak wa pichlag yane kadher *audijar*" having been read as if the last word was "*aur dukhtar*," though the first version appears the correct one.

In our opinion, the onus lay in the present case upon the defendants to prove a customary power of alienation in their favour, and this they have failed to discharge.

The appeal must be dismissed, but without costs, as respondent has not appeared and submitted to the previous interlocutory order of this Court as to the costs of the adjournment granted on the 25th June 1891.

Appeal dismissed.

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No. 33.

AMAR SINGH AND SUNDAR DAS,—(PLAINTIFFS),—
APPELLANTS,

Versus

AZIZ-UD-DIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 139 of 1891.
(BENTON & RIVAZ, JJ.)

Joint Hindu family—Mitakshara—Liability of ancestral property in execution of decree against father alone.

The authorities governing the question as to how far in a joint Hindu family governed by the law of the Mitakshara, consisting of a father and sons, the ancestral property is liable in execution of decrees obtained against the father alone, collected and discussed.

*Further appeal from the decree of Colonel C. H. T. Marshall,
Divisional Judge, Lahore, dated 2nd January 1891.*

P. C. Chatterjee, for appellants.

K. P. Roy, for respondents.

The sole question in this appeal was as to how far, in a joint Hindu family governed by the Mitakshara, the ancestral property is liable in execution of decrees obtained against the father alone, his sons not being parties.

The facts and arguments sufficiently appear from the judgment of the Chief Court which was delivered by

18th April 1892. RIVAZ, J.—The facts which have to be stated to explain this case are few and simple. The plaintiffs are the sons of the third defendant, Bhai Sawaya Singh, and these persons form a joint Hindu family, governed, in respect to the questions which arise for decision in the present case, by the law of the Mitakshara, there being admittedly no rule of customary law applicable. In July 1883, Bhai Sawaya Singh, plaintiffs' father, agreed to stand security for one Pandit Ishri Pershad (defendant No. 2) for a sum of Rs. 12,000 borrowed by the latter from Aziz-ud-din (the first defendant in the present case). By a deed executed on the 19th July 1883, Pandit Ishri Pershad hypothecated certain immoveable property of his own as security for his debt, and Sawaya Singh, as surety, also hypothecated certain ancestral house property. In 1888 Aziz-ud-din sued for and obtained a simple money decree against both principal (defendant No. 2) and surety (defendant No. 3) for interest due under the agreement of the 19th July 1883. In execution, the decree-holder attached certain house property belonging to Sawaya Singh and his sons, which it appears is ancestral property other than that mentioned in the deed of 1883. The sons of Sawaya Singh (the present plaintiffs) objected to their interest in the said property being brought to sale, but their objection was overruled, and they have therefore instituted the present suit to set aside the attachment of the houses upon the ground that they are not bound by defendant No. 3's unlawful action in becoming surety for the payment of defendant No. 2's debt to defendant No. 1.

Plaintiffs' suit has been dismissed by the Courts below, and they are, therefore, the appellants in this Court.

The question as to how far in a joint Hindu family governed by the law of the Mitakshara, consisting of a father and sons, the ancestral property is liable in execution of decrees obtained against the father alone, has been discussed in a series of rulings by the Judicial Committee of the Privy Council, by

the High Courts and by this Court. The latest published decision of their Lordships of the Privy Council is *Mahabir Pershad v. Mohenwar Nath Sahai* (I. L. R., 17 Calc., 584), and the earlier rulings of that tribunal will be found collected in the report of that case.

The grounds upon which the plaintiffs claim to escape liability in the present case are: (1) that they are not bound by their father's undertaking to become surety, because the agreement is of an illegal character, or at least of a character which gives rise to no obligation on the part of the sons to discharge their father's liability; (2) because the agreement of suretyship was not entered into on account of an antecedent debt; (3) because the pious obligation on the part of the sons of a Hindu father to pay their father's debts does not arise till after the father's death; (4) because the decree obtained in the present case is a simple money decree and only purports to be against the father.

The contention that the sons are not compellable to pay sums for which their father was a surety appears to be untenable, the matter being concluded by authority,—*vide Mayne's Hindu Law*, Section 279 (page 305, 4th edition), Note (i); Civil Judgment No. 60, *Punjab Record* of 1886, and *Sitaramayya v. Venkatramanna* (I. L. R., 11 Mad., 373).

As to the argument that the sons cannot be held liable for an undertaking not arising out of an antecedent debt, in absence of proof that the money was required for the legal necessities of the family, in which connection Civil Judgment No. 152, *Punjab Record*, 1888, is relied upon, it is sufficient to point out that the contention breaks down with reference to the particular facts of this case and the true question for decision. It may be conceded that the original contract of suretyship entered into by the third defendant was analogous to the case of an alienation for a present advance, rather than in consideration of an antecedent debt. But what we now have to deal with is the decree subsequently obtained against the father under his contract of guarantee, and the question is whether the whole of the ancestral property is liable to attachment and sale in execution of that decree. The decree was in my opinion undoubtedly obtained for an antecedent debt, and any sale which followed in execution would be of the nature of an involuntary alienation for a debt of that character. The above view renders it unnecessary to consider

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whether the broad distinction drawn in Civil Judgment No. 152, *Punjab Record* of 1888, between alienations in consideration of a present loan and those for the payment of antecedent debts, can be supported in view of the more recent expositions of the law by the Judicial Committee.

The next contention, viz., that the pious obligation to pay the father's debts cannot arise till after his death, does not appear to me to be one from which the plaintiffs in the present case can derive any benefit.

The liability to pay the father's debts no doubt arises from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts (*Mayne*, Section 279), but, as pointed out in Section 285, this principle has now received a considerable extension by its application to cases where the father has mortgaged or sold the family property to liquidate his private debts, or where it has been sold in execution of decrees against him for such debts. "Where," continues Mr. Mayne, "such transactions affect a larger share of the property than his own interest in it, the result evidently is that the sons are compelled indirectly to discharge during the father's life an obligation which, in strictness, only attaches upon them at his death." In *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187) their Lordships pertinently observe (at page 196): "It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts."

Lastly, it remains to consider how far the fact of the decree obtained against the father being a mere personal money decree can be held to affect the question of the sons liability. In *Nanomi Babuasin v. Modhun Mohun* (I. L. R., 13 Cal., 21), where the Privy Council discuss and explain the admitted want of harmony on all points among the earlier decisions both in India and by the Committee, it is stated that there is no conflict of authority as to the general principle that sons cannot set up their rights, which are to take present vested interests on their birth, jointly with their father, in ancestral estate, against their father's alienation for an antecedent debt, or against his creditor's remedies for his debt, if such debt has not been contracted for an immoral purpose. But it was further pointed out that in cases where a doubt arises upon the

proceedings and in regard to the intention of the parties as to what has in reality been bargained for and sold,—whether it is the interest of the father alone or the entire joint estate,—this is a question which the sons, not being parties to the execution proceedings, or to the sale, can insist upon having tried out in a suit of their own, as well as the question as to the nature of the debt,—the latter right, however, availing them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate. In *Nanomi Babuarin's* case the decree obtained was a money decree and against the father alone, but it was, nevertheless, held that the entire family estate passed by the sale in execution and that the sons' claim for exemption of their shares failed. It is not necessary for the purposes of the present case to consider further the decisions (of which *Deen Dyal v. Jagdeep Narain*, I. L. R., 3 Calc., 198, and *Hardi Narain's* case, I. L. R., 10 Calc., 626, are instances) based upon the special fact that the decree-holder chose for reasons of his own to sell only the right, title, and interest of the father, the finding being that under such circumstances the father's share was all that he had acquired; for in the present case it is clear, not only that the plaintiffs' father when entering into his contract of guarantee purported to hypothecate certain ancestral property in its entirety, but also that the judgment-creditor has attached and is attempting to sell the whole property, and not merely his judgment-debtor's right, title, and interest therein. The present case appears, therefore, clearly to fall within the general rule as enunciated by the Judicial Committee and not within the exception. The case in its facts and general features strongly resembles that reported as Civil Judgment No. 87, *Punjab Record* of 1887, (see also No. 93, *Punjab Record* of 1888,) and a reference to the former of the two decisions would appear to me to afford a sufficient answer to the suggestion made on the appellants' behalf that the fact of no sale in execution having yet taken place in the case before us materially distinguishes it from many of the Privy Council rulings relied upon by the respondents' pleader.

I should, in fact, have felt little difficulty in deciding the present appeal by overruling all the appellants' contentions were it not for the decision of a Division Bench of the Allahabad High Court in *Ram Dyal v. Durga Singh* (I. L. R., 12 All., 209), which was strongly insisted upon by the appellants' pleader. It must be admitted that the facts of the case relied

upon are very similar to those of the present case. The father of a joint Hindu family was the obligor of a single bond, which the obligees had put in suit, having thus obtained a simple money decree against the father alone. In execution, ancestral property was attached, and the sons of the obligor sued to release their share from attachment. Mr. Justice Straight in delivering judgment referred to his ruling in *Beni Madho v. Basdeo Patak* (I. L. R., 12 All., 99), and cited the recent decision of the Privy Council in *Minakshi Nayudu v. Immudi Kanaka* (I. L. R., 12 Mad., 142). The Court premised that if, in the case under consideration, a sale of the whole property had taken place, the plaintiffs' suit would fail upon the authority of the last cited ruling, unless he could show either that the interest of the father alone was sold, or that the debt upon which the decree was founded was immoral or illegal. The Court then proceeded to find that the decree being a purely personal one for a debt incurred by the father personally, the plaintiffs could impeach the attachment upon the ground that it affected interests which the decree could not touch, and which, therefore, could not be attached under it, and were entitled to have their interests exempted from the threatened sale. I confess that the conclusion arrived at appears to me consistent neither with the judgment in *Beni Madho's* case, nor with the decision in *Minakshi Nayudu's* case. In *Beni Madho v. Basdeo Patak*, Mr. Justice Straight, after an examination of all the rulings of the Judicial Committee published since the decision in *Basa Mall v. Maharaj Singh*, I. L. R., 8 All., 205, observed: "The outcome of the whole of this body of decisions appears to be this, that where a Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale, or charged in a security, or dealt with by a decree, it rests upon him, if he seeks to escape from having his interests affected by the sale, to establish that the debt he desires to be exempted from payment was of such a character that he as the son of a Hindu would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate." The above appears to me to correctly summarise the rulings examined, but I fail to understand how it supports

the later decision. The decision in *Minakshi Nayudu's* case is admittedly against the Allahabad ruling now being considered unless the element in the latter case of the sale being merely threatened and not carried out is material. I fail myself to see how any real distinction can be based upon this circumstance, and the passage quoted from *Beni Madho's* case appears to negative any such distinction. I think, then, that we cannot accept the ruling in *Ram Dayal v. Durga Singh* as warranting the decision of the present appeal in plaintiffs' favour.

I would dismiss the appeal and would allow defendant No. 1 his costs throughout, as I can see no sufficient reason why plaintiffs, who have been unsuccessful in all three Courts, should not incur the usual liability for such want of success.

This order as to costs disposes of the defendant Aziz-ud-din's cross objection.

BENTON, J.—I concur. The decree will be as proposed by 18th April 1892. my learned colleague.

Appeal dismissed.

Full Bench.

No. 34.

MEGHA & JASSA,—(PLAINTIFFS),—APPELLANTS,

Versus

SHADI & OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 879 of 1890.

(ROE, FRIZELLE & RIVAZ, JJ.)

Criminal Procedure Code, 1882, Sections 133 and 137—Public place—Right to sue for declaration of rights in Civil Court.

Notwithstanding the words in Section 133, Criminal Procedure Code 1882: "No order duly made by a Magistrate under this section shall be called in question in any Civil Court," it is open to a person who claims to be the sole proprietor of land, with reference to which a Magistrate has made a conditional order under the said section treating it as a "public place," which conditional order has, in due course of law, been made absolute under Section 137 of the Code, to sue the opposite party in the Civil Court for a declaration of his rights in such land.

Punjab Record, No. 94 of 1889, overruled.

Further appeal from the decrees of B. L. Harris Esquire, Divisional Judge, Delhi, dated 21st March 1890.

This was a reference to a Full Bench to consider the true meaning of the words in Section 133, Criminal Procedure Code, 1882: "No order duly made by a Magistrate under this section shall be called in question in any Civil Court."

The lower Court decided the case adversely to the plaintiffs, holding that a suit could not be maintained—with reference to the ruling of the Chief Court reported as *Punjab Record* No. 94 of 1889. The order of reference was as follows:—

23rd Decr. 1891.

ROE, J.—The plaint sets forth that the plaintiffs are owners and have long been in possession of a piece of land outside the village, and enclosed it with a hedge; that certain of the villagers have questioned their title, and attempted to interfere with their possession, and have caused the Magistrate to interfere and wrongly issue an order under Section 133, Criminal Procedure Code, for the removal of the hedge, on the ground that it is an obstruction of a public place; the plaintiffs therefore sue to establish their title and possession and to have the Magistrate's order set aside.

The Divisional Judge has held that, following *Punjab Record* No. 94 of 1889, the suit will not lie. It is admitted that it will not lie as regards so much of the relief asked for as refers to setting aside the order of the Magistrate; but we are asked to strike this out as mere surplusage, and to treat the suit either with or without a formal amendment of the plaint as one for a declaration of plaintiffs' sole proprietary title to the land in dispute. And in this form it is contended the suit will lie. I do not think it would, if *Punjab Record* No. 94 of 1889 is a correct exposition of the law. But that decision was expressly based on a Calcutta case, which has since been overruled by the Full Bench of that Court (see I. L.R., 15 Calc., 460), and I think that its correctness is open to much doubt. Section 133, Criminal Procedure Code, empowers the Magistrate to pass various orders, provisionally directing persons to do or abstain from doing certain acts. And it provides that no orders so passed shall be called in question in any Civil Court. No doubt it is necessary for the Magistrate before passing an order under Section 133 to arrive at certain findings of fact, such as, as in the present case, whether a piece of ground is a

public place or not. But what the proviso says is, not that no finding on which the Magistrate has, or should have, based his order shall be directly or indirectly called in question in a Civil Court; it merely says that the order itself shall not be so questioned. My present opinion is that a person claiming to be owner of land, with regard to which a Magistrate has issued an order under Section 133, Criminal Procedure Code, presumably on the ground that it is a public place, may sue in the Civil Court for a declaration of his title, not against the Magistrate, but against the persons questioning his title. If he succeeds in obtaining his order, he may apply to the Criminal Courts to set aside or abstain from enforcing the Magistrate's order on the ground that it has now been shown to be based on an erroneous view of the facts, and the Criminal Courts may grant or refuse the application. But what use the plaintiff may make of a decree of the Civil Courts, or what further action may be taken by the Criminal Courts, are matters with which the Criminal Courts have no concern.

The question involved is one of considerable importance, and we therefore refer it to a Full Bench in the following form:—Can a person claiming to be sole proprietor of land, with reference to which a Magistrate has issued an order under Section 133, Criminal Procedure Code, treating it as a "public place" sue in the Civil Courts for a declaration of his sole title to that land?

FRIZELLE, J.—I agree to the reference to a Full Bench. 23rd Decr. 1891.

The opinion of the Court was delivered as follows:—

RIVAZ, J.—The question referred to the Full Bench is in 29th Jany. 1892. the following terms:—

"Can a person claiming to be sole proprietor of land, with reference to which a Magistrate has issued an order under Section 133, Criminal Procedure Code, treating it as a 'public place,' sue in the Civil Courts for a declaration of his sole title to that land"?

As a fact, the conditional order passed by the Magistrate in the present case under Section 133, Criminal Procedure Code, was in due course made absolute under Section 137 of the same Code, so that I think we must take the substantial question referred to be, whether under the above circum-

stances the present suit will lie, viewed as one by the plaintiffs for a declaration of their rights in the land, to which the Magistrate's proceedings referred, so much of the prayer of the plaint as directly calls in question any order of the Magistrate being struck out as mere surplusage.

Chapter X (Sections 133—143) of the Criminal Procedure Code of 1882, dealing with the removal of obstructions and nuisances, corresponds substantially in its main provisions with Chapter XX of the Criminal Procedure Code of 1861 and Chapter XXXIX of the Code of 1872. Under each Code, where the Magistrate having jurisdiction considers that steps should be taken for the removal of an obstruction or a nuisance from a public place, the first step to be taken is a conditional order to the person causing the obstruction or nuisance, directing him either to remove the nuisance or obstruction, or to show cause against the order. Such person may, on receipt of service of the order, either obey it, appear and show cause against the order, or apply for a jury to try the question whether the order is reasonable and proper. Finally, acting under the procedure prescribed for each particular case, the Magistrate will either allow the proceedings to drop, or make the conditional order absolute. The Codes of 1861 and 1872 provided in practically identical language that no suit would lie in respect of anything necessarily or reasonably done to give effect to the final order in the proceeding, where the defendant refuses or neglects to obey the same. Similarly, the Code of 1882 (Section 140) enacts that no suit shall lie in respect of anything done in good faith in carrying out the order after it has been made absolute. But as to the conditional order under Section 133, there is an express provision, not to be found in either of the earlier Codes, that "no order duly made by a Magistrate under this section shall be called in question in any Civil Court." I think a review of the most important rulings under the earlier Codes will show that the object of this new provision is to prevent any recourse to the Civil Courts while the proceedings before the Magistrate are still pending. Whether the same provision, or any other provision of Chapter X, forbids a suit, like the present, brought after the termination of the proceedings to prove that the property dealt with by the Magistrate is private, and not public, property, is a question which will be also considered in due course in the light of the same authorities. But I think

the point to be emphasised at the outset is that the direct prohibition against questioning the Magistrate's order in a Civil Court refers to the order under Section 133 only, the same prohibition not being repeated in either of the sections under which that order can be made final and absolute.

In *Ujalamayi Dasi v. Ohandra Kumar Neogi* (4 B. L. R., F. B., 24), the question about which the previous rulings of the Calcutta High Court were conflicting, was settled by a Full Bench, that no suit would lie in the Civil Court to set aside an order duly made by a Magistrate under Section 308 of the Criminal Procedure Code of 1861 (which corresponds with Section 133 of the present Code), or to restrain him from carrying such order into effect. The reasons underlying this decision are thus expressed by Peacock, C. J.: "These summary powers are given to the Magistrate for the purpose of enabling him speedily to remove nuisances. If, when a Magistrate having entered into the question has determined that a nuisance does exist, he is to be restrained by a Court of civil judicature from carrying his order into execution, it might be two or three years before the nuisance could be removed, by which time all the injury may have been actually sustained. While the suit is going on, persons may be poisoned by the malaria arising from the nuisance, or the conflagration may take place, or lives may be lost by the falling of a ruinous wall on passengers, or their cattle may be drowned in a tank or well which has not been properly fenced to prevent danger." In *Lalji Ukheda v. Jowba Dowla*, (8 Bom., H. C. R., App. Civil Jurisdiction, 94,) however, the Bombay High Court held that though the concluding clause of Section 311 of Act XXV of 1861 prevented the Civil Court from entertaining a suit to restrain a Magistrate from carrying out an order made under Section 308, or a suit for damage against the Magistrate or any other person in carrying out such order in the manner provided by law, it did not bar the person against whom such an order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property. And this view has been adopted by the same Court in later rulings under the Code of 1872: *vide Nilkanthapa Malkapa v. The Magistrate in charge of the Sholapur Taluka* (I. L. R., 6 Bom., 670), and *Balaram Chaturkalal v. The Magistrate in charge of Taluka Igatpuri* (*ibid*, 672). In *Mutty*

Ram Sahoo v. Mohi Lall Roy (I. L. R., 6 Calc., 291), a Division Bench of the Calcutta High Court decided that though a Civil Court is not competent to set aside the order of a Magistrate made under Section 521 of the Criminal Procedure Code of 1872 (Section 133 of the present Code), such Court can, irrespective of such order, try the question, whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit, and those who claim under them. It does not appear from the report of the above case that the Magistrate's conditional order had been made absolute, though it does appear that the person against whom the order was directed had applied for and obtained a jury, who found the order reasonable and proper, whereupon the order was obeyed (*vide* page 301 of the report). Such obedience, under the Code of 1872, rendered any specific direction declaring the order under Section 521 to have become absolute, unnecessary. The question decided in the last cited case is, therefore, substantially the question referred to us in the present case. In both cases the conditional order had been carried into effect. The reasoning of Field, J., in *Mutty Ram Sahoo v. Mohi Lall Roy (ubi super)* seems to me very cogent and convincing,—“The contention “that because a Magistrate has made an order for the removal “of an obstruction or nuisance from a certain place, and for “the purpose of such order has found or declared such place “to be a thoroughfare or public place, therefore those persons “who appeared before the Magistrate in those proceedings are “for ever concluded from saying that such place is not a “thoroughfare or public place, but private ground, appears to “me untenable. The Code of Criminal Procedure does not “require the Magistrate to take evidence* or to proceed according to judicial forms before declaring a place to be a “thoroughfare or public place. No appeal is allowed from the “Magistrate's finding. It is very right that a Magistrate “should have a summary power of removing an obstruction “or nuisance from what appears to him to be a thoroughfare “or public place; but it would be very unreasonable, and serious “consequences would ensue, if a Magistrate could, in such “summary fashion, without evidence, or the form of judicial

* It should, however, be noted that the Code of 1882 (Section 137) does require the Magistrate to take evidence if the defendant appears to show cause against the order.

“proceedings, make an order declaring valuable land to be a thoroughfare or public place, which would have the effect of a judgment *inter partes* between all persons who appeared before him. Looking at the whole scope of the Code of Criminal Procedure, I am unable to gather that such was the intention of the legislature.”

The above decision was disapproved of by another Division Bench in *Khoda Bakhsh Mundul v. Monglai Mundul* (I. L. R., 14 Calc., 60), a decision under the present Code, which last case was cited and followed by this Court in Civil Judgment No. 94, *Punjab Record* of 1889. It is not clear from the report of *Khoda Bakhsh Mundul's* case whether the order under Section 133 of the Code had or had not been carried into effect. But I should gather from a remark made at page 63 of the Judgment, that the order, which was to remove an erection, had been obeyed. As pointed out in the order of reference in the present case, *Khoda Bakhsh Mundul v. Monglai Mundul*, has been overruled by a Full Bench: *vide Chuni Lal v. Ram Kishen Sahu* (I. L. R., 15 Calc., 460). In this case the order under Section 133, Criminal Procedure Code, which was for the removal of a thatched house on land found to be public, had been made absolute under Section 137 before the suit for a declaration of plaintiff's right to the land was instituted. It was held that the suit was maintainable under Section 42 of the Specific Relief Act, the order of the Criminal Court under Section 137, notwithstanding. All the authorities are collected and considered in the above case by Wilson, J., who delivered the opinion of the Full Court. The result as regards the point with which we are specially concerned is summarised as follows:—

“The question remains whether the proceedings that have taken place before the Magistrate are a bar to this suit; in other words, whether an order absolute by a Magistrate for the removal of an obstruction from a place held by him to be a highway is final and conclusive upon the question of highway or no highway. The decision of a Magistrate in a summary proceeding is not, I think, ordinarily final and conclusive on a question of title, and does not exclude the jurisdiction of the Civil Courts to inquire into the matter, unless the intention of the Legislature that it shall have such effect is shown. In the present case, no such intention is expressly declared, and such indications of intention as are to be found seem to me to point in the other direction. It is expressly

"said that a preliminary order under Section 133 is not to be called in question by a Civil Court, and that no suit shall lie (which means, I apprehend, no suit for damages) for anything done in good faith under Section 140 or Section 142. But nothing is said as to the order absolute which, if anything does so, affects the title." With the above view I would express my respectful acquiescence. In my opinion the Legislature has now made its intention sufficiently clear that though the action of the Magistrate cannot be hampered in the manner suggested by Sir Barnes Peacock by any suit in the Civil Court which substantially calls in question the order under Section 133, Criminal Procedure Code, there is no prohibition against a suit in the Civil Court to try any question of title about which the parties who appeared before the Magistrate are at issue after that order has been obeyed, or enforced, or has otherwise ceased to be in active operation.

I would reply to the reference that the order under Section 133, Criminal Procedure Code, having become absolute under Section 137, and being therefore no longer liable to be called in question, there is no bar to the maintenance of the present suit for a declaratory decree in the Civil Court.

29th Jany. 1892. ROE, J.—I concur in the answer proposed and in the reasons given for it. I still think that there may be some doubt whether a suit for a declaratory decree is a suit which calls in question the order of a Magistrate under Section 133, Criminal Procedure Code, but the authorities quoted by my learned colleague at least afford good ground for holding that it is. But it seems quite clear that when, as in the present case, the order under Section 133 has been followed by action, or an order rendering it absolute or superseding it, there is no bar to a suit for a declaratory decree on the question of title.

29th Jany. 1892. FRIZELLE, J.—I also am of opinion that the suit lies.

The appeal was finally disposed of by a Division Bench as follows:—

29th Jany. 1892. ROE, J. (FRIZELLE, J., concurring).—The answer of the Full Bench shows that the suit, as one for a declaratory decree, is cognizable by the Civil Courts. The case is therefore remanded to the lower Court under Section 562, Civil Procedure Code, for decision on the merits. Law stamp to be refunded. Other costs to be costs in the case.

Appeal allowed : cause remanded.

No. 35.

TAJU AND KALU,—(PLAINTIFFS),—APPELLANTS,

Versus

BARU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 129 of 1890.

(RIVAZ & STODDON, JJ.)

Custom—Alienation—Childless proprietor—Gujars of Hoshiarpur tahsil—Burden of proof.

Found, in a suit the parties to which were Gujars of the Hoshiarpur tahsil, that no custom was established justifying an alienation by a childless proprietor to two nephews in the presence of other nephews,—the onus being upon the alienees to establish the custom.

Per RIVAZ, J.—In cases raising important issues of custom, it is desirable that Courts of first instance should, before deciding as to the burden of proof, call for evidence from both sides and defer adjusting the question of onus until all possible information has been obtained from either party.

Punjab Record, No. 107 of 1887 and No. 59 of 1889, referred to.

Further appeal from the decrees of R. W. Trafford Esquire, Divisional Judge, Hoshiarpur, dated 21st October 1889.

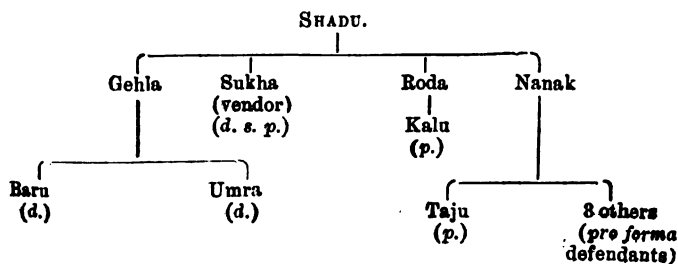
K. P. Roy, for appellants.

Madan Gopal, for respondents.

The parties to this suit were Gujars of the Hoshiarpur tahsil. A childless proprietor made a gift—under cover of a sale—in favour of two of his nephews, in the presence of other nephews.

The sole question for decision was as to the validity of the alienation, and the ancillary point as to the party upon whom the burden of proof fell. The facts sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—The parties are Gujars of the Hoshiarpur tahsil and are related as shown below :— 18th Feby. 1892.



Sukha during his lifetime executed two sale-deeds of his ancestral land in favour of Baru and Umra, defendants, and now that Sukha is dead, two of his other nephews sue to contest the validity of the alienation. The case has passed through several Courts and phases, and the burden of proof has been tossed backwards and forwards between the parties by the various officers who have dealt with the case. I think myself that it would be well in cases raising important issues of custom, if Courts of first instance, before deciding as to the burden of proof, called for evidence from both parties, and deferred adjusting the onus until all possible information as to the custom had been obtained from either party. The present case has been three times remanded, principally owing to a difference of opinion as to the imposition of the onus among the Courts who have heard the case on appeal.

As to the question of necessity, we entirely agree with the concurrent findings of the lower Courts, that no necessity for the alienations, which are, in form, sales, or any part of them, has been established, and we are disposed to regard the transaction as a gift under colour of a sale.

As to any definite proof of custom, the *Wajib-ul-arz* is altogether opposed to any customary power of alienation by a childless proprietor, save for necessity. Otherwise, the evidence on either side is meagre, and neither party has succeeded in proving affirmatively either the validity or invalidity of an alienation to two nephews in the presence of other nephews.

But it was urged for the alienees (respondents) that as they were not strangers, but were heirs equally entitled to succeed as such with the plaintiffs (objectors), the burden of proving the invalidity of the alienation by custom lay upon the plaintiffs, and Civil Judgment No. 59, *Punjab Record* of 1889, and other cases were cited, which were said to be in support of this view. Now I take it, that we must still (in considering questions of this kind) start with the Full Bench ruling, No. 107, *Punjab Record* of 1887, as affording the general rule in the matter, and I understand the principle of that ruling to be that in *all* cases of alienation by childless proprietors there is a *prima facie* presumption *against* the power of alienation. Sometimes this presumption is very strong, as in the case where the alienee is a stranger, and the village of the alienor is of an exclusive and conservative type. Where the alienation is to a relation, one of several heirs equally entitled

by right of inheritance, the presumption is considerably weaker, and may often be, and has been frequently held to be, rebutted by proof that the favoured heir has lived with and taken care of, and, in fact, maintained the childless uncle or other childless relation, managing his land for him and ministering to his wants. This class of alienation is, in fact, strongly allied to alienations for necessity. But even in this last class of case, the presumption which we have to start with is one adverse to the power of a childless proprietor to distribute his property unequally among his heirs, or to the absolute exclusion of some of his heirs, and in each case the alienee must prove the particular facts which he relies upon as rebutting the presumption.

In the present case, there is no sufficient proof that either Umra or Baru was favoured for any special reasons, which would indicate an alienation for necessity, in the sense just referred to. Sukha may have preferred these two nephews to his other relations, but it is not established that they supported him or maintained him in his old age. The preference was a merely arbitrary one, and is further disfigured by a pretended sale. I would hold, especially since the *Wajib-ul-ars* prohibits all kinds of alienations by childless proprietors without necessity, that the onus was upon the defendants to justify the alienation in their favour, and that they have failed to do so.

I would accept this appeal, and grant the plaintiffs a decree declaratory of the fact that the alienations impugned will not affect their reversionary interests after the death of Sukha's widow, with costs in all the Courts.

STODDON, J.—I concur.

18th Feby. 1892.

Appeal allowed.

No. 36.

IMAM BAKHSH & OTHERS,—APPELLANTS,

Versus

COLLECTOR OF MUZAFFARGARH,—RESPONDENT.

} APPELLATE SIDE.

Case No. 32 of 1891.

(ROE & FRIZELLE, JJ.)

Land Acquisition Act, 1870, Section 29—Agreement of Judge and assessors as to compensation—Finality of decision.

In case the Judge and one or both of the assessors agree as to the amount of compensation in a reference made to the Court under the provisions of Part III of the Land Acquisition Act, 1870, their decision

thereon shall be final, and no appeal lies, even if they differ upon minor points not falling within the scope of their jurisdiction.

*First appeal from the order of Khan Muhammad Hyat Khan, O.S.I.,
Divisional Judge, Mooltan, dated 28th October 1890.*

J. C. Basu, for appellants.

Sinclair, for respondent.

This was an appeal from an award of compensation made by the Judge and assessors in a case referred for determination by the Collector under Section 15, Land Acquisition Act, 1870.

The Judge and assessors agreed as to the amount of compensation to be given for the land, but differed upon certain minor matters which, it was contended, did not fall within their jurisdiction under the Act.

The judgment of the Chief Court was delivered by

13th Feby. 1892.

ROSE, J.—A preliminary objection is taken by Mr. Sinclair that no appeal lies, inasmuch as the Divisional Judge has accepted the finding of the assessors as to the value of the land itself, and this was the only question he really had to decide. After hearing the pleader for the appellants on this point, and on the case generally, we are of opinion that the contention is correct. The Divisional Judge with the assessors were invested with jurisdiction to make an award by a reference being made to them under Section 15, Act X of 1870. That reference is made when the award of the Collector, under Section 11, has not been accepted, and the award to be made under Section 11 is expressly stated to be one of "compensation for the value of the land," in determining which the Collector is by Section 13 restricted to a consideration of the points mentioned in Section 24. Similarly, in Section 34 the Court and assessors are directed to state distinctly the particular sums allowed under each of the clauses of Section 24. It appears to us clear that the Court and assessors are, like the Collector, only empowered to base their award of compensation on the grounds stated in Section 24, unless, as appears to have been the case here, possession has been taken under Section 17 before the award is made, in which case they are also to allow compensation for crops and trees. In the present case, the Court and both assessors agree as to the compensation both for the land itself and for crops. They differ as to the rate of rent to be allowed, but this was a matter over which

they had no jurisdiction. Rent, properly so called, that is payment for the use of land not permanently acquired, is dealt with in Chapter VI of the Act.

For the occupation of land permanently acquired from the date of possession to the date of the payment of compensation, the owners are entitled, not to rent, but to interest, under Section 42, and the interest, like the additional Rs. 15 per cent., forms no part of the award, but is added by the Collector himself (Section 42). So much of the award as deals with this Rs. 15 per cent. and "rent" must be treated as mere surplusage. And as on the other points the Court and assessors agree, it follows that under Section 29 the award is final.

It has indeed been suggested that the word "earning" in Section 24 includes rent. This is obviously not the case.

We have been asked if we hold, as we do, that no appeal lies, to treat the appeal as an application for revision, and to interfere on the ground that the Court has committed a material irregularity in that (1) it did not treat the assessors as persons appointed to hear the case and make an award jointly with itself, but treated them merely as local commissioners in making a report; (2) it did not take evidence in open Court. It certainly seems from the record that the procedure was irregular in this respect, but we do not think the irregularity material. The assessors and the Court itself were persons well acquainted with the general value of land, and whatever mass of so-called evidence might have been formally recorded, their final award would certainly have been based entirely on their opinion of the value of the land after a personal inspection. This they all made, whether jointly or separately, is immaterial, and the award they have made is, on the face of it, a reasonable one. We therefore consider that, even treating the appeal as a petition of revision, there is no ground for interference.

With the above remarks the appeal is rejected, but we make no order as to costs, for had the Divisional Judge dealt with the case strictly in the manner prescribed by law, there would have been probably no appeal at all.

Appeal dismissed.

APPELLATE SIDE. {

No. 37.

MUSSAMMAT JASODHA DEVI,—(DECREE-HOLDER),—
APPELLANT,

Versus

LACHMAN DAS AND SITA RAM,—(JUDGMENT-DEBTORS),—
RESPONDENTS.

Case No. 644 of 1891.

(BENTON & RIVAZ, JJ.)

*Execution of decree—Leave to withdraw—Effect of Sections 373 and 647,
Civil Procedure Code.*

The decision of the High Court of Allahabad (I. L. R., 12 All., 392), that Section 647 of the Civil Procedure Code makes Section 373* applicable to proceedings in execution of decree, dissented from.†

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Delhi, dated 5th March 1891.

Charan Das, for appellant.

K. P. Roy, for respondents.

This was an appeal from an order of the Divisional Judge of Delhi, who held, following the decision of the High Court of Allahabad in I. L. R., 12 All., 392, that Section 647, Civil Procedure Code, makes Section 373 applicable to proceedings in execution of decree.

The judgment of the Chief Court was delivered by

2nd April 1892.

RIVAZ, J.—The question involved both in this appeal and No. 649, which we have heard at the same time, is whether the Full Bench ruling of the Allahabad High Court, reported in I. L. R., 12 All., 392, should be accepted as a correct exposition of the law, and be followed. Owing to a doubt entertained by the Senior Judge of this Court as to the soundness of the Allaha-

* Section 373.—If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit, or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

† A Bill expressly providing that Section 373 does not apply to execution proceedings is now before the Legislative Council.—*Editor.*

bad ruling, a reference was made to a Full Bench, but fell through, as the parties compromised their dispute. We do not think that any further reference to a Full Bench is necessary. The ruling in I. L. R., 12 All., 392, has been expressly dissented from by the Calcutta High Court in three rulings, reported at pages 462, 515 and 635 of the 18th Volume of the Calcutta Series of the Indian Law Reports. The Madras High Court has also refused to follow the same ruling (1 Mad. Law Journal, 750). The Bombay High Court has in two reported cases expressed views which are entirely opposed to the opinion of the Allahabad Court (*vide* I. L. R., 11 Bom., 467; and 10, *ibid.*, 62.)

Our own opinion is in accord with the views expressed by the three High Courts, other than the High Court of Allahabad, and this being so, we decide, without hesitation, in accordance with the weight of the authorities.

We accept this appeal, and, setting aside the orders of the lower Courts, we direct the first Court to proceed with the decree-holder's application for execution and dispose of it in accordance with law.

The appellant must get his costs in this and the lower appellate Court.

Appeal allowed.

No. 38.

DOGAR MAL,—(PLAINTIFF),—APPELLANT,

Versus

JAMIAT,—(DEFENDANT),—RESPONDENT.

Case No. 58 of 1891.

(BENTON & RIVAZ, JJ.)

} APPELLATE SIDE.

Par delictum—Party stopped from pleading his own fraud.

The plaintiff sued for possession of half a house which he alleged was the joint property of himself and the defendant: the latter relied upon a registered deed of sale to him from the plaintiff, purporting to sell his (plaintiff's) interest in the house. The plaintiff replied that this was a fictitious transaction entered into in fraud of his creditors.

Held, that the plaintiff was precluded by the rule of *par delictum* from relying on such an allegation.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 29th April 1890.

Krishna Singh, for appellant.

The plaintiff sought to avoid a registered deed of sale, which he alleged had been executed by him in favour of the defendant in fraud of his creditors. The Court decided, in accordance with the rule of *par delictum*, that the plaintiff was estopped from setting up such an allegation.

The facts appear from the judgment of the Court which was delivered by

2nd April 1892.

RIVAZ, J.—We think that the Divisional Judge's decision is correct.

Plaintiff claims possession of half a house, which he alleges to be the joint property of himself and the defendant. The latter propounds a registered deed of sale, under which the plaintiff purported to sell to the defendant his interest in the house in question. Plaintiff replied that this was a fictitious transaction entered into in fraud of his creditors.

In our opinion, plaintiff cannot be allowed to advance this plea. The contract was fully carried into effect, inasmuch as defendant was already in possession of the property, and the physical dispossession of plaintiff was not necessary to complete his right under the deed of sale. The maxim *in pari delicto melior est conditio possidentis* must be applied. This maxim, it is said, is established "not for the benefit of plaintiffs or defendants, but on principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract to recover it back." And "the true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party," (Leake on Contracts, 774, 775). So, again, (*ibid.*, 775,) "if property has been actually conveyed or delivered in execution of an illegal contract or purpose, it cannot be recovered back merely upon the ground of the illegal origin of the transfer." The above principles are, we think, consistent with what has been laid down by this Court in No. 114, *Punjab Record* of 1879, No. 11, *Punjab*

Record of 1875, and other rulings; see also I. L. R., 10 Mad., 17.

The appeal is dismissed, but each party will pay his own costs throughout.

Appeal dismissed.

— — —
No. 39.

DEWA SINGH AND GURDIT SINGH,—(PLAINTIFFS),—

APPELLANTS,

Versus

MUSSAMMAT JAWALI,—(DEFENDANT),—RESPONDENT.

Case No. 1043 of 1891.

(ROE & STODDON, JJ.)

} APPELLATE SIDE.

Civil Court—Suit for declaration that land was not subject to partition—Jurisdiction.

The plaintiff sued asking for (1) a declaration that a holding of 52 ghumaos 6 kanals and 19 marlas was not subject to partition; (2) any other relief that the Court might grant.

The lower Courts declined to entertain the suit on the ground that it called in question the order of a Revenue Officer, and that no question of title had been referred to a Civil Court.

Held, that in the absence of an adjudication by the Revenue Officer himself under Section 117, Punjab Land Revenue Act, 1887, the suit was cognizable by the Civil Courts.

Further appeal from the decree of E. W. Parker Esquire, Additional Divisional Judge, Amritsar, dated 8th June 1891.

The Courts below having held that the suit was not cognizable by the Civil Courts, the plaintiff preferred a further appeal to the Chief Court, which reversed the decree under appeal and remanded the suit for trial on the merits.

The facts sufficiently appear from the judgment of the Court which was delivered by

ROE, J.—The plaint is headed as one for a declaration that a holding of 52 ghumaos 6 kanals 19 marlas is not liable to partition. It sets forth that defendants had applied to the Revenue Courts for partition; that by a *razinamah* dated 4th May 1888, defendant had accepted an allowance of grain, which had been duly paid, and that plaintiff had sunk a well and improved the land; that on defendant's application for partition, plaintiffs' objection had been overruled and he had been referred to a

6th April 1892

regular suit. He therefore asked (1) for a declaration that the land was not subject to partition; (2) or any other relief that the Court might grant.

The Courts have declined to entertain the suit on the ground that it calls in question the order of a Revenue Officer, and that no question of title has been referred to a Civil Court.

It appears to us quite clear that the plaint does raise a question of title for the decision of which the Civil Courts have jurisdiction. The only thing that could deprive them of this jurisdiction would be an adjudication on it by the Revenue Officer himself under Section 117, Act XVII of 1887. There has certainly been no such adjudication in the present case, and even if there had been, an appeal would have lain from the order to the Divisional Judge.

We therefore set aside the orders of the lower Courts, and direct that the suit be restored to the register of the first Court and disposed of on the merits.

Law stamp to be refunded: other costs to be costs in the case.

Appeal allowed: cause remanded.

No. 40.

SARDAR KIRPAL SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE. {

Versus

NAWAB KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1178 of 1891.

(BENTON & RIVAZ, JJ.)

Punjab Courts Act, Section 39 (b) and (c)—Value of suit—Mesne profits—Course of appeal.

The plaintiffs sued for mesne profits alleged to have been realised by a Receiver. The plaintiffs, for the purposes of Section 50, Civil Procedure Code, valued the relief sought, approximately, at Rs. 2,000. They were decreed Rs. 3,405-15-6, and they appealed for Rs. 1,946 more. The defendants also appealed against the whole decree.

Held, that the appeal from the District Judge's decree lay to the Divisional Court and not to the Chief Court.

Punjab Record, No. 63 of 1891, referred to.

First appeal from the decree of J. A. Anderson Esquire, District Judge, Rawalpindi, dated 6th January 1891.

Ishwar Das, for appellants,

Sangam Lal, for respondents.

The plaintiffs sued for mesne profits alleged to have been realised by a Receiver, and valued the relief sought, approximately, at Rs. 2,000. They eventually obtained a decree for Rs. 3,405-15-6, and appealed for Rs. 1,946 over and above the amount decreed. The defendants also appealed against the whole decree.

The appeals were returned by the Divisional Judge on the ground that they did not lie to his Court. The judgment of the Chief Court was delivered by

BENTON, J.—The question before us in these cross appeals, 13rd April 1891. Nos. 1178 and 1072, is a preliminary one, namely, whether the appeals lie to this Court or to the Court of the Divisional Judge. The parties to both appeals desire that they should be heard by this Court.

In their plaint the plaintiffs said they were not sure as to the exact amount, but they sued for Rs. 2,000 as the approximate amount. They were decreed Rs. 3,405-15-6, and Rs. 438-6-0 costs. The plaintiffs brought an appeal for Rs. 1,946 over and above the amount decreed. The defendant, Nawab Khan, also appealed against the whole decree. The Divisional Judge was of opinion, when the appeals were presented to him, that they did not lie to his Court but to this Court. He returned them, quoting *Punjab Record* No. 63 of 1891 as authority for his opinion.

We find the suit to be one for money falling under Section 7, para. 1, Act VII of 1870, or perhaps, more properly, a suit for accounts falling under Section 7, para. 4 (f) of the same Act. The suit was for mesne profits alleged to have been realised by a Receiver, and Section 11 of the Act would apply, seeing that the amount decreed exceeded the amount at which the plaintiff valued the relief he sought.

The question we have now to determine is whether these are appeals from a decree in an original suit of value exceeding

Rs. 5,000 with reference to Section 39 (b) of the Punjab Courts Act. We find that, in accordance with Section 8 of the Suits Valuation Act, the value of the present suit for the computation of Court fees and for jurisdiction is the same. The value for the former purpose we find, in accordance with the provisions of the Court Fees Act above quoted, to be the amount claimed (Section 7, para. 1), or the amount at which the relief sought is valued (Section 7, para. 4 (f)), with the addition, possibly, of any amount required to be paid under Section 11 of the Act. This would bring up the valuation to Rs. 3,405-15-6, that is to say, short of Rs. 5,000. We observe that, under Section 50 of the Civil Procedure Code, the plaintiff in his plaint in such a suit as the present, that is to say, one for the amount which will be found due on taking unsettled accounts between plaintiff and the defendant, need only state approximately the amount sued for. This amount, however perhaps with the adjustment elsewhere provided for for fixing the Court fees, must, in our opinion, be the criterion by which the value for computation of Court fees is determined.

The ruling of this Court (*Punjab Record* No. 63 of 1891) is not in all respects in point, as that case was concerned with the effect of Section 39 (a) of the Punjab Courts Act, the wording of which is different from Section 39 (b). We find an opinion there expressed that the jurisdiction is to be determined with reference to the claim made, and not with reference to the decision upon the claim, in which we entirely concur, and, adopting that opinion, we cannot see that in the present case the claim made was one exceeding Rs. 5,000.

We accordingly find that the present appeals lie to the Divisional Court, and we direct that they be returned to the appellants for presentation in that Court. The parties will pay their own costs in this Court, save that the respondent, Kale Khan, who is not a party to the decree and has been made respondent by mistake, will be allowed Rs. 10 costs from the plaintiffs.

Appeal returned.

No. 41.

MUTSADDI AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

SAWAN,—(PLAINTIFF),—RESPONDENT.

Case No. 578 of 1891.

(ROE & FRIZELLE, JJ.)

} REFERENCE SIDE.

Civil and Revenue Courts—Site of water-mill—Purpose subservient to agriculture—Jurisdiction.

The plaintiff sued for damages for the unlawful possession of a water-mill.

Held, that the suit was cognizable by the Civil and not by the Revenue Courts, the purpose for which the site* of the mill was occupied, viz., the grinding of corn, not being a purpose “subservient to agriculture” within the meaning of Section 4 (1), Punjab Tenancy Act, 1887.

Case referred to the Chief Court under Section 100, Punjab Tenancy Act, 1887, by E. B. Steedman Esquire, Collector, Hoshiarpur by order dated 27th October 1891.

The plaintiff sued for damages for the unlawful possession by the defendants of a water-mill. The suit was filed in a Revenue Court, and upon appeal to the Collector, he referred the case to the Chief Court under the provisions of Section 100, Punjab Tenancy Act, 1887.

The following judgments were delivered—

FRIZELLE, J.—I am of opinion that the Court which has 15th Feby. 1892. referred this case is right in holding that the suit, which is stated to be one for “damages for the unlawful possession by “the defendant of a water-mill,” cannot be considered either a suit falling under clause (n) or clause (o) of Section 77 of the Tenancy Act. It is not one of the class of cases contemplated by clause (o), and is not a suit for rent or a sum recoverable under Section 14 of the Act, as a water-mill is not “land” as defined in Section 4 of the same Act. My only doubt on this point arose from paragraph 3 of the Report of the Select Committee of the Legislative Council, dated 7th September 1887, on the draft of the Tenancy Act as passed into law. From this it appears that the language of Section 4 was amended from the

* Section 4 (1).—Land means land which is not occupied as the site of any building in a town or village, and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes the sites of buildings and other structures on such land.

previous draft with special reference to water-mills. The amendment lay in adding the words "and other structures" to "buildings," for the reason that in some cases water-mills would not be covered by the word "buildings." But I do not think that this amendment shows that it was the intention of the Act that water-mills, even when situated outside towns and villages (*vide* Section 4 (1)), should be considered land occupied for agricultural purposes or purposes subservient to agriculture, except the site is otherwise used for such purposes. The word "structures" was merely added to "buildings" because sometimes a water-mill is something less than a building. There may be other ways in which land on which a water-mill stands is used for agricultural purposes or purposes subservient to agriculture, but it is not so used merely because a water-mill stands upon it. It does not appear that the site of the water-mill in dispute in this suit was in any other way used for such purposes, and the suit ought therefore to have been tried by a Civil Court. As it was tried in good faith by a Revenue Court, and the parties have not been prejudiced by the mistake in jurisdiction, the decree should be registered in the Court of the Munsif.

16th Feby. 1892.

ROE, J.—I quite concur in the order proposed, and in the reasons for it. I think it impossible to hold that the purpose for which the site of the mill is occupied, *viz.*, the grinding of corn, is a purpose "subservient to agriculture."

Reference returned.

No. 42.

IMDAD ALI,—(PLAINTIFF),—APPELLANT,

Versus

GHULAM JILANI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 1281 of 1890.

(ROE & FRIZELLE, JJ.)

APPELLATE SIDE. }

Presumption of death—Rule of Muhammadan law superseded by Evidence Act.

Redemption of mortgage—Indivisible transaction—One co-sharer cannot redeem his share.

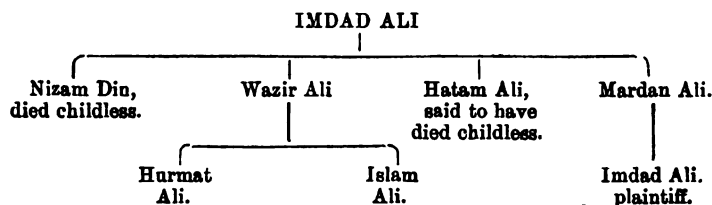
The rule of Muhammadan law which refuses to presume a person dead until ninety years from the date of his birth, is a rule of evidence, and not of substantive law, and is superseded in all cases in which the question of the presumption whether a man is alive or dead, arises under Section 108, Indian Evidence Act (*cf.* also Section 2 of the Act).

In the absence of a special contract to the contrary, a mortgage is one indivisible transaction, and must be redeemed as a whole, or not at all. A co-sharer cannot sue to redeem his own share only.

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Hoshiarpur, dated 24th June 1890.

K. P. Roy, for respondents.

This was a suit for redemption. The questions of law arising, and the decision thereon, sufficiently appear from the judgment of the Chief Court which was delivered as follows—



ROE, J.—The suit as originally instituted was by all the representatives of the original mortgagor—*viz.*, (1) the sons of Wazir Ali; (2) Imdad Ali—for redemption of the whole mortgage. It was dismissed by the Munsif on the 23rd July 1889. All the plaintiffs appealed to the Divisional Judge, who dismissed the appeal of the sons of Wazir Ali, on the ground that a similar suit by their father had already been dismissed. The appeal of Imdad Ali was accepted, and the case, so far as he was concerned, remanded, under Section 562 of the Civil Procedure Code, for rededecision on any issues that might arise. On 31st January 1890, the Munsif gave Imdad Ali a decree for redemption of one-third of the property only, holding that it could not be presumed that Hatam Ali was dead. 12th Feby. 1892.

The sons of Wazir Ali made no appeal against the order of the Divisional Judge dismissing their claim, nor have the defendants appealed against the decree in favour of Imdad Ali. Imdad Ali appealed to the Divisional Judge, who has held (1) that he cannot claim, as a co-mortgagor, to redeem the whole mortgage; (2) that the lower Court has rightly held that there is no presumption of Hatam Ali's death, and that Imdad Ali's share is, therefore, one-third and not one-half.

To take the latter point first, it is admitted that Hatam Ali has not been heard of for more than seven years, and that there is no proof, or reason for believing, that he is alive. But the Divisional Judge holds that as Hurmat Ali was not grown up when Hatam Ali left the village, there was no reason why

the latter should have communicated with him, and, therefore, Hurmat Ali is not "a person who would naturally have heard of" Hatam Ali, within the meaning of Section 108 of the Evidence Act.

It appears to us that the words quoted from Section 108 refer, not to any particular individual with whom the missing person might have been expected to communicate, but to his relations and neighbours generally, who, as a body, would naturally have heard of him. In the present case, there is no ground whatever for supposing that Hatam Ali has, within the last seven years, been heard of by any of his relations or friends. The presumption under Section 108, therefore, is that he is dead.

This is hardly denied by the pleader for the respondents, but he quotes I. L. R., 1 All. 53; 2 All. 625; and 7 All. 297, as authority for holding that in cases of succession to an estate, and consequently in suits for redemption, the rule of Muhammadan law, which refuses to presume a person dead till ninety years from the date of his birth, is to be followed. The first two cases quoted no doubt support this view, but they were distinctly overruled by the third case, 7 All., 297, which is the unanimous judgment of the whole Court, and lays it down clearly that the rule of Muhammadan law was a rule of evidence, or procedure only, and not a rule of substantive law, and that it was superseded, in all cases in which the question of presumption arose, by Section 108 of the Evidence Act. A similar principle, on the question of presumption as to the period of gestation, was laid down by this Court in No. 1 of 1884, *Punjab Record*.^{*} We think, therefore, that Imdad Ali's share of the estate is clearly one-half.

As to his right to redeem the whole mortgage, the Divisional Judge observes that he has failed to show any rule of law by which a co-mortgagor is entitled to redeem the whole mortgage. Had the Divisional Judge referred to page 250 of *Ghose on Mortgages* † (2nd edition), he would have seen that this is

^{*} Cf. also *Punjab Record* No. 76 of 1891.—*Editor*.

† It is necessary to observe that a mortgage security is indivisible, and that no one is entitled to redeem a part of the estate in mortgage on payment of a proportionate amount of the debt secured by the mortgage; you must either redeem the whole, or not at all. Thus, if four brothers, each of whom is entitled to a fourth share of an estate, mortgage it to a creditor as security for a debt contracted by them, one of the brothers cannot redeem his share on payment only of a fourth part of the debt secured by the mortgage.—*Ghose on Mortgages*, 2nd edition, 250.

clearly the law. As there pointed out, in the absence of a special contract to the contrary, a mortgage is one indivisible transaction; it must be redeemed as a whole, or not at all. Hence the rule laid down in the last clause of Section 60 of the Transfer of Property Act, and also in numerous decisions of this Court, that a co-sharer cannot sue to redeem his own share only. That he may sue to redeem the whole is almost a corollary from this rule, and in the case quoted for the respondents (I. L. R., 9 Bom. 128) as an authority for holding that he cannot do so, the ground on which his claim to redeem the whole was refused was expressly stated to be the fact that his own share had been completely divided off, and treated as an entirely separate property. It appears to us quite clear that if the present suit had been instituted by the appellant Imdad Ali alone for the redemption of the whole property with the representatives of Wazir Ali as *pro forma* co-defendants, he would have been entitled to a decree. We think that he has not lost his right from the fact that the representatives of Wazir Ali joined him as co-plaintiffs, and that their suit was dismissed. As regards the Divisional Judge's order dismissing the appeal of Wazir Ali's representatives, and at the same time remanding the case of Imdad Ali for re-trial under Section 562, we would observe that whilst it is very questionable on the merits, it is most certainly, as pointed out in a judgment* of this Court about to be published in the *Punjab Record*, wrong in form. An Appellate Court cannot deal with an appeal piecemeal in this way, and the inconvenience of its attempting to do so is apparent from the present case. How far the order of the Divisional Judge is binding on the representatives of Wazir Ali, and what effect it has on their rights as between them and Imdad Ali it is not for us to consider now. We are of opinion, as already stated, that, as against the mortgagees, Imdad Ali alone has a right to redeem the whole mortgage, and this right is not affected by any decision as regards the rights of the representatives of Wazir Ali. The right of the mortgagees was and is only the right to hold the land as a security for their money and interest, until the money is paid, and there can be no reason why the payment of this money by one co-mortgagor should not be as good as its payment by another.

Defendants offered no evidence in the first Court in support of their claim for payment for improvements. We

* *Punjab Record* No. 3 of 1892.

therefore, modifying the decrees of the lower Courts, decree Imdad Ali possession of the whole of the mortgaged property on payment of Rs. 173 with costs throughout. This payment is to be made within six months from this date, otherwise the suit will stand dismissed without prejudice to Imdad Ali's right to bring a fresh suit for redemption within the period of limitation.

Appeal allowed : decrees varied.

No. 43.

NIHAL CHAND,—(DEFENDANT),—APPELLANT,

Versus

RAI SINGH AND NAURANGA,—

(PLAINTIFF),—

DURGA,—(DEFENDANT),—

} RESPONDENTS.

} APPELLATE SIDE.

Case No. 1064 of 1890.

(RIVAZ & STOGDON, JJ.)

Pre-emption—Transferable rights of occupancy—Section 10, Punjab Laws Act—Right created by Statute or Contract—Perpetual lease, whether tantamount to sale.

The provision of Section 10, Punjab Laws Act, 1872 (as amended), that the right of pre-emption shall *prima facie* be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands, applies not only to sales by *occupancy tenants*, but is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration.

A right of occupancy may be transferable within the meaning of Section 10, Punjab Laws Act, 1872 (as amended), either because a power to transfer is given by the Tenancy Act, or because there is an agreement between the landlord and tenant excluding the operation of such of the provisions of the Act as would otherwise prevent alienation. In the present case, the right of occupancy being created by contract would ordinarily, and in the absence of express agreement, be non-transferable; but in conferring the right, the landlord had expressly granted full power of alienation and had thus created or sold a transferable right.

Sembla.—A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale (*I. L. R.*, 15 *Calc.*, 184, referred to).

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 17th May 1890.

K. P. Roy, for appellant.

Morton, for respondents.

This was a suit for pre-emption of a right of occupancy. The questions of law arising and the facts in connection therewith, sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—The main question to be determined in this case is whether the document of the 22nd October 1888, under which the plaintiffs claim, gives rise to a right of pre-emption

4th Feby. 1892.

in their favour under the provisions of the Punjab Laws Act (as amended). The document in question purports to be a lease in perpetuity granted in consideration of a premium of Rs. 700. No future rent is to be paid thereunder, and the largest possible rights (short of absolute ownership), including an unrestricted power of alienation, are conferred upon the lessee. The Divisional Judge is of opinion that the transaction cannot be held to amount to a sale of the proprietary right in the land dealt with, but he considers that the document evidences a sale of a transferable right of occupancy within the meaning of Section 10, clause (b), of the Punjab Courts Act, and that the right of pre-emption must, therefore, be presumed to attach. Construing the lease as above indicated, he has decreed pre-emption in plaintiffs' favour. As the plaintiffs are satisfied with this decree, and the defendant lessee (or vendee) only appeals, I do not think it necessary to consider whether the document in question really amounts (as was contended by the respondents) to an absolute sale of the proprietary right, at least until it is made to appear that the Divisional Judge's decree cannot be upheld as it stands. But I might observe in passing that the view, that a perpetual lease does not give rise to the right of pre-emption merely on the ground that it is tantamount to a sale, receives direct support from the decision of the Calcutta High Court in *Dewanulla v. Kazem Molla* (I. L. R., 15 Calc., 184) and the earlier cases therein cited.

On the question whether the lease in the present case can be rightly held to amount to a sale of a transferable right of occupancy, we heard a good deal of argument. Section 9 of the Punjab Laws Act enacts that the right of pre-emption arises in respect of sales of immoveable property, and Section 10 goes on to provide that such right shall, in the absence of proved custom, be presumed to extend (*inter alia*) to all transferable rights of occupancy affecting lands within the village boundary. Now I confess that at first sight it does appear as if the reference to sales of transferable rights of occupancy was intended to be to sales *by occupancy tenants* of their rights, the pre-emptive right in such case being regulated by the last clause of Section 12 of the Act. But I find on looking into the matter, that the question, whether or no the provision in Section 10 is also applicable to transactions under which proprietors create a right of occupancy in another for a consideration, is concluded by authority in favour of the more extended interpretation of

the section, and I think that we should follow the cases which

Civil Judgment No. 67, *Punjab Record* of 1874.

" " " 196, " " " 1882.

" " " 120, " " " 1883.

" " " 179, " " " 1888.

I have noted in the margin. But it is contended that, even assuming that the

present transaction can be regarded as a sale of a right of occupancy, it is not a sale of a *transferable* right, and, therefore, the right of pre-emption must be proved, and not presumed, to exist. But this argument is, I think, sufficiently answered by a reference to Civil Judgment No. 196, *Punjab Record* of 1882. A right of occupancy may be transferable within the meaning of Section 10 of the Punjab Laws Act, either because a power to transfer is given by the provisions of the Tenancy Act, or because there is an agreement between the landlord and tenant excluding the operation of such of the provisions of that Act as would otherwise prevent alienation. Here the right of occupancy being created by contract would ordinarily, and in the absence of express agreement, be non-transferable; but in conferring the right, the landlord has expressly granted full power of alienation, and has thus created or sold a *transferable* right.

The final contention was that plaintiffs had proved no right of pre-emption superior to that of the vendee. The last clause of Section 12 of the Punjab Laws Act was first relied upon; but it was pointed out that that clause can only apply (as it was applied in Civil Judgment No. 106, *Punjab Record* of 1882) to a case of a sale *by an occupancy tenant*. It was then suggested that both plaintiffs and the vendee were landholders of the village (the latter by virtue of a gift, which is said to have preceded the lease in the present case), and were, therefore, equally entitled. But the Divisional Judge has recorded in his judgment that it was admitted before him that the village is held on ancestral shares, and that the plaintiffs are collaterals of the lessor (while the defendant lessee is not related), and this statement was not controverted, or shown to be an incorrect admission. Plaintiffs, therefore, have a preferential right under Section 12, clause (b) of the Act.

I would dismiss the appeal with costs.

STODDON, J.—I concur

4th Feb'y. 1892.

No. 44.

APPELLATE SIDE. {

JAFAR KHAN,—(PLAINTIFF),—APPELLANT,

*Versus*FAZAL MOHI-UD-DIN AND ANOTHER,—(DEFENDANTS),
—RESPONDENTS.

Case No. 209 of 1890.

(RIVAZ & STODDON, JJ.)

Agreement regulating rights of pre-emption—Not authorised by Punjab Laws Act—Landowner in dheri or sub-division of patti.

An agreement recorded in the *Wajib-ul-arz* between the proprietors of a village as to the persons to whom the right of pre-emption would belong in future cannot prevail against the provisions of Section 12, Punjab Laws Act, 1872 (as amended), which give a detail of the persons to whom the right to pre-empt property in a village belongs, in the absence of a custom to the contrary. Such agreements are not saved by the section, and the law must, therefore, prevail against them.

Quære.—Whether the provisions of Section 12, Punjab Laws Act, are applicable to a *dheri* or sub-division of a *patti*.

Further appeal from the decree of T. O. Wilkinson Esquire, Divisional Judge, Amritsar, dated 2nd January 1890.

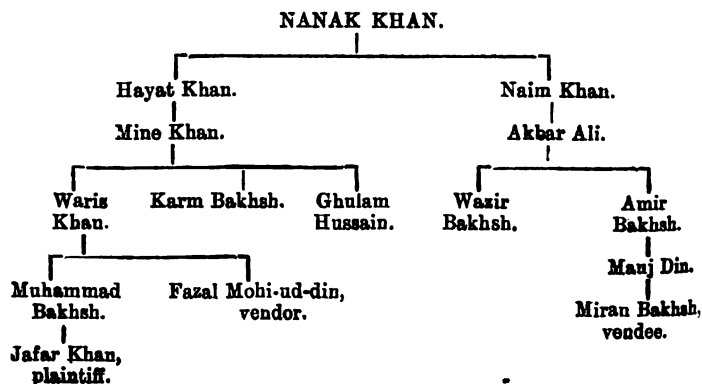
Madan Gopal, for appellant.

Higgins, for respondents.

The plaintiff sued to establish a right of pre-emption in 33 ghumaos, 5 kanals, 3 marlas of land. The questions for determination and the decision thereon sufficiently appear from the judgment of the Court which was delivered by

5th Feby. 1892.

STODDON, J.—This is a suit for pre-emption of 33 ghumaos, 5 kanals, 3 marlas of land in the village of Kadirpur, sold by Fazal Mohi-ud-din to Miran Bakhsh, on the 5th March 1889. The following pedigree shows the relationship existing between plaintiff and the vendor and vendee—

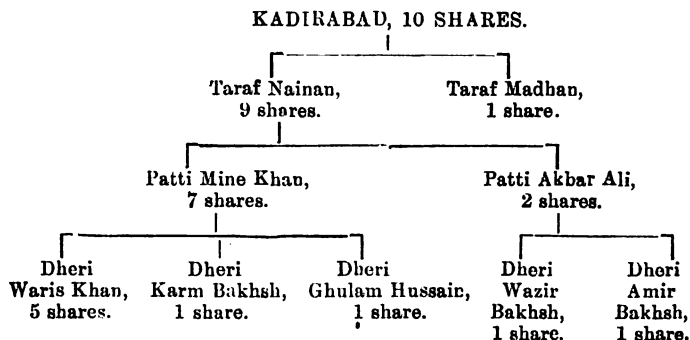


Plaintiff claimed to have a superior right of pre-emption, on the ground that the vendor was his uncle, while he was only distantly related to the vendee. In the first Court his claim appears to have been maintained (a) on the ground that it was supported by clause 9 of the *Wajib-ul-arz*, and (b) on the ground that the village is held on ancestral shares, and the case was therefore governed by the provisions of clause (b), Section 12, of the Punjab Laws Act. Clause 9 of the *Wajib-ul-arz* is to the effect that no alienation had hitherto taken place in the village; that a proprietor was competent to alienate his property, but he must first offer it to his collateral relatives, and on their refusal to buy it, he might sell it to strangers. The first Court found that this clause did not give a near collateral a preference to one more remote. It also found that the village was not held on ancestral shares, and dismissed the suit. On appeal, the Divisional Judge confirmed its finding on point (a), and further found that as the constitution of the village and any rights therefrom arising were not set out in the plaint, nor was the claim in any way based on these circumstances, the pronouncement of the Court thereupon was surplusage.

Plaintiff has appealed to this Court. In his second ground of appeal he relies on clause 9 of the *Wajib-ul-arz*, but the entry in question is merely evidence of custom; and in the present case it reveals its worthlessness as such, because it starts with a statement that no alienations had taken place hitherto. The statement is a true one, because the village had only recently been founded. There cannot, therefore, have been any custom regarding pre-emption, and at most the clause (e) is an agreement between the proprietors of the village as to the persons to whom the right would belong in future. An agreement of this nature cannot prevail against the provisions of Section 12 of the Punjab Laws Act, which gives a detail of the persons to whom the right to pre-empt property in a village belongs, in the absence of a custom to the contrary. Agreements are not saved by the section, and the law must, therefore, prevail against them.

The Divisional Judge was wrong in refusing to consider plaintiff's claim from any other point of view. The plaint is not very happily expressed, but it is clear from it that plaintiff did not base his claim specially on the *Wajib-ul-arz*; he based it principally, if not entirely, on the fact of his being a nearer relative of the vendor than the vendee is. Even if his claim is

not maintainable on this basis, there is no reason why it should not have been decreed if it can be shown to be supported by law, and it certainly seems to be maintainable under clause (d), Section 12 of the Punjab Laws Act, on the ground that he is a landowner of the patti in which the property is situate. The following table will show the constitution of the village—



The land in dispute is situated in the Waris Khan dheri of the Mine Khan patti of the Nainan taraf. Plaintiff is a landowner in all three. The vendee, on the other hand, is a landowner in the Amir Bakhsh dheri of the Akbar Ali patti of the Nainan taraf. It is possible that the provisions of clause (d) of Section 12 of the Punjab Laws Act may not be applicable to such minor sub-divisions as dheris; but the pattis of Mine Khan and Akbar Ali are certainly sub-divisions within their purview. It may be noted that Waris Khan's dheri is in reality one half of the whole village, and that it contains 276 ghumaos, 6 kanals, 10 marlas of land, and is five times larger than the Madhan taraf, which contains only 55 ghumaos, 17 marlas. Further, it appears that the village is still held on ancestral shares. The whole of the proprietors are not descended from a common ancestor, because the proprietors of the Madhan taraf are distinct from those of the Nainan taraf, but they are still holding the shares which were originally acquired by their ancestors when they settled in the village. Waris Khan acquired more land than the others, but whatever was acquired has been handed down from father to son, and ancestral shares have not been lost sight of; nor does possession appear to be the measure of right as in the case of a *bhaichara* village. For the above reasons we are of opinion the plaintiff has a superior right to the vendee to purchase the land in dispute. We, therefore, accept the appeal and remand the case to the Divisional Judge for decision on

the merits after such further remand, under Section 566 of the Civil Procedure Code, as he may consider necessary. Certificate of refund of institution stamp to be given. Other costs to follow the event.

Appeal allowed : cause remanded.

No. 45.

MUSSAMMAT BEGAM AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

MUSSAMMAT NUR BIBI AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1209 of 1891.

(BENTON & RIVAZ, JJ.)

Alienation by Muhammadan widow—Widow handing over property to her deceased husband's adopted son—Limitation Act, 1877, Articles 118 and 125.

The plaintiffs sued for a declaration, after cancellation of an adoption, that an alienation made on the 2nd May 1883 by the widow of one K., who died fourteen years ago, leaving a widow and daughters, would not affect their (the daughters') rights after the widow's death.

The suit was purely a declaratory one, the widow being still alive, and admittedly entitled to give possession during her lifetime to whom she pleased.

Held, that the suit must be taken to be in substance the one referred to in Article 118, Schedule II, Limitation Act, 1877, and not that contemplated by Article 125, and was, therefore, barred by time.*

There was, in fact, no alienation by the widow, in the true sense of the term, to which the plaintiffs could or need take exception. What the widow purported to do in 1883 was to hand over to K.'s rightful heir, and adopted son, the property to which he should have been recorded the successor on K.'s death.

Article 118.—To obtain a declaration that an alleged adoption is invalid, or never in fact took place.

Six years ...

When the alleged adoption becomes known to the plaintiff.

Article 125.—Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.

Twelve years.

The date of the alienation.

Further appeal from the decree of Colonel C. H. T. Marshall, Divisional Judge, Lahore, dated 20th August 1891.

Ganga Ram, for appellants.

Shah Din, for respondents.

The sole question for consideration in this appeal was whether the suit was governed by Article 118 or Article 125 of the second Schedule of the Limitation Act, 1877. The facts are fully stated in the judgment of the Court which was delivered by

21st May 1892.

RIVAZ, J.—The question arising for decision upon this appeal is whether the present suit is barred by limitation.

The plaint is headed as one “for a declaratory decree “after setting aside an adoption, that the alienation by “Mussammat Begam, defendant No. 1, to Mehr Din, defendant “No. 3, is invalid, and will not affect plaintiffs’ rights after “Mussammat Begam’s death.” The material allegations contained in the plaint are that the property in suit belonged to one Kaim, who died fourteen years ago, leaving a widow, defendant No. 1, and four daughters, viz., the three plaintiffs and defendant No. 2. That after Kaim’s death, the widow succeeded on a life interest with the daughters as reversioners. That on 2nd May 1883, defendant No. 1, in order to injure plaintiffs’ rights, with the collusion of defendant No. 2, transferred the whole of Kaim’s property to, and effected a mutation of names in favour of, Mehr Din, defendant No. 3 (who is son of defendant No. 2), alleging that Kaim had adopted him. That no custom of adoption exists in the parties’ tribe, nor did Kaim, in fact, adopt Mehr Din, nor had the widow any power to make a transfer. The prayer of the plaint is that a declaration may be made, after cancellation of the adoption, that the alienation by the widow is invalid and not binding upon the plaintiffs. The suit was filed on the 31st March 1891, and it is not denied that plaintiffs knew of the alleged adoption upon the 2nd May 1883, as indicated in their plaint.

The point upon which the lower Courts have differed is as to whether Article 118 or Article 125 of the Second Schedule of the Limitation Act governs the case.

It will be observed that the suit is purely a declaratory one, Mussammat Begam being still alive, and admittedly entitled to give possession during her lifetime to whom she pleases. There is no question, therefore, as to whether a suit for possee-

sion could be maintained in spite of the provision in Article 118 of the Second Schedule of the Limitation Act, but the question, as already stated, is by which of the two articles quoted the declaratory suit must be governed.

The true point to be considered is, what is the nature of the declaration which the plaintiff substantially asks for. Now it will be observed that there is, in fact, no alienation by the widow in the true sense of the term to which the plaintiffs can or need take exception. What the widow purported to do in 1883 was to hand over to Kaim's rightful heir, and adopted son, the property to which he should have been recorded the successor on Kaim's death. She does not purport to exercise any power of alienation vested in herself, but merely to restore her husband's property to the true owner. This being so, it seems clear that the only declaration which can avail the plaintiffs would be one relating to the alleged adoption, rather than one relating to the so-called alienation by the widow. The suit must, therefore, in our opinion, be taken to be in substance the one referred to in Article 118 of the Second Schedule of the Limitation Act, and not that contemplated by Article 125, and upon this view the suit was rightly held by the first Court to be time barred. We are fortified in the above opinion by a reference to a decision of the Allahabad High Court—*Man Kuar v. Lachman Singh*, reported at page 244 of the Weekly Notes for 1886—where the facts were almost identical with those of the present case.

We accept this appeal, and, setting aside the Divisional Judge's order, restore that of the first Court dismissing the suit as barred by limitation, with costs in defendants' favour throughout.

Appeal accepted.

— — —
No. 46.

RAM DITTA,—(PLAINTIFF),—PETITIONER,

Versus

MOHKAM,—(DEFENDANT).—RESPONDENT.

Case No. 1560 of 1891.

(FRIZELLE & RIVAZ, JJ.)

} REVISION SIDE.

Appellate Court—Appeal of one defendant—Decree in favour of plaintiff respondent who has not appealed, against another respondent—Civil Procedure Code Sections 544 and 561.

There is no rule of procedure which would justify an Appellate Court, on the appeal of one defendant, in decreeing in favour of a

plaintiff-respondent against another respondent who was also a defendant in the first Court, in the absence of any appeal or cross-objection by the plaintiff filed in the Appellate Court.

The general rule is that an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal: the Code of Civil Procedure provides at least two exceptions to this rule, which are contained in Sections 544 and 561 of the Code.

Petition under Section 622, Civil Procedure Code, 1882, for revision of the decree of Lala Jagal Kishore, Subordinate Judge, Hoshiarpur, dated 26th May 1891.

Lal Chand, for petitioner.

Bates, for respondent.

The material facts and the questions which the Court was asked to consider on the Revision side sufficiently appear from the judgment of the Court which was delivered by

17th May 1892.

RIVAZ, J.—The material facts are briefly these. One Ganesha was in debt to Mohkam. Mohkam sold the debt to the plaintiff, who sued both Ganesha and Mohkam for the amount of the debt, viz., Rs. 452-4-0. The first Court decreed Rs. 185-8-0 against Ganesha, and Rs. 266-12-0 against Mohkam. The finding was that Mohkam had actually realized the latter amount from Ganesha. Mohkam alone appealed to the District Judge. That officer disagreed with the finding that Mohkam had realized anything from Ganesha. He, therefore, accepted the appeal and set aside so much of the decree as affected the appellant, Mohkam.

We are asked on revision to hold that the District Judge acted with material irregularity in not, after coming to his finding that Mohkam was not liable, decreeing the whole claim against Ganesha. We fail to see how he could have legally acted thus in passing final orders on Mohkam's appeal. The general rule is that an Appellate Court can only modify a judgment or decree, so far as it affects appellant, without interfering as to parties who do not appeal. The Code of Civil Procedure provides at least two exceptions to this rule, and they are contained in Sections 544 and 561 of the Code. Neither of these sections can be held applicable to the present case, and, therefore, the ordinary rule must prevail. We know of no rule of procedure which would justify an Appellate Court on the appeal of one defendant, in decreeing in favour of plaintiff-respondent against a co-respondent, who was also a defendant in the first Court, in the absence of any appeal or

cross-objection by the plaintiff filed in the Appellate Court. The dictum relied upon in I. L. R, 3 Calc., 738, is expressed in too general terms for us to accept it as applicable to the circumstances of the present case.

The application is rejected; but each party will pay his own costs in this Court.

Application refused.

No. 47.

**MUSSAMMAT JOWALI AND ANOTHER,—(DEFENDANTS),
—APPELLANTS,**

Versus

KARM SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 858 of 1890.

(RIVAZ & STODDON, JJ.)

Custody of wife—Husband undergoing sentence of transportation for life at Port Blair—Equity and good conscience.

The lower Appellate Court gave the plaintiff, a Jat of the Jullundur District, who was undergoing a sentence of transportation for life at the penal settlement of Port Blair in the Andaman islands, a decree for the custody of his wife.

Held, that the decree should not have been made and must be reversed, it not being in accordance with the principles of equity and good conscience that a young woman, who had hardly attained maturity when her husband was transported for life, should be directed to proceed to a penal settlement and cohabit with him there.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 10th March 1890.

The plaintiff, a Jat of the Jullundur District, who was undergoing a sentence of transportation for life at Port Blair in the Andaman islands, sued for the custody of his wife, who at the time the sentence was passed upon her husband had hardly attained maturity.

The Divisional Judge, Jullundur, gave the plaintiff a decree, which upon appeal was reversed by the Chief Court, the judgment of which was delivered by

STODDON, J.—In this suit the Divisional Judge of Jullundur 1st Feby. 1892.
as given Karm Singh, a Jat of the Jullundur District, now

residing in the penal settlement of Port Blair in the Andaman Islands, where he is undergoing a sentence of transportation for life, a decree for custody of his wife, Mussammat Jowali, against Mussammat Jowali herself and one Ratta Singh, with whom she has recently gone through a form of marriage. Both of them have appealed to this Court. Respondent has been duly served, and has submitted a petition to this Court, through the Port Blair authorities, setting forth his grounds of objection to the appeal. He has not, however, appeared either in person or by agent, and therefore the appeal has been heard *ex parte*.

In our opinion the decree should not have been passed. It is tantamount to an order to the wife to resume cohabitation with her husband. Under the peculiar circumstances of the case there is no prospect of her being able to obey it, or for her husband being able to enforce it, and it is a mere force for Courts to pass orders to which due effect cannot be given. In the present case, an additional ground for refusing to give plaintiff a decree is that his object in suing was apparently, not to compel his wife to return to his own protection, but rather to place her in the power of his relatives, and thus prevent her from cohabiting with Ratta Singh. Moreover, the case appears to be one to which the principles of equity and good conscience should be applied, as was done by their Lordships of the Privy Council in the case published at 11 Moore's Ind. App., 551, and it is certainly contrary to them that a young woman, who had hardly attained maturity when her husband was transported for life, should be directed to proceed to a penal settlement and cohabit with him there in a society composed of the chief criminals of India.

For the above reasons, we accept this appeal and restore the decree of the first Court dismissing the suit. Each party will pay its own costs throughout. It is of course to be understood that we pass no decision on the point whether Mussammat Jowali's marriage with Karm Singh is still subsisting, or regarding the legality of her present connection with Ratta Singh.

Appeal allowed.

No. 48.

MUTA ALI AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MEHTAB RAI,—(DEFENDANT),—RESPONDENT.

Case No. 1417 of 1890.

(BENTON & RIVAZ, JJ.)

} APPELLATE SIDE.

Specific Relief Act, 1877, Section 42—Declaratory decree—Plaintiff alleging title as well as possession, asking for declaration as to possession only—Judicial discretion.

The plaintiffs sued, alleging that they were owners and in possession of certain land; that two deeds of sale were executed by them in 1877 and 1879, purporting to convey portions of the said land to the defendant; that the defendant never got possession under the said deeds, as the full consideration money was never paid by him; that notwithstanding this fact, the defendant had succeeded in obtaining *dakhil kharij* from the Revenue authorities, which was calculated to cause injury to the plaintiffs, though it had not ousted them from actual possession; and the plaintiffs, therefore, prayed for a declaratory decree that *they were in possession of the entire land*, and that the mutation in the defendant's favour would not affect their rights of possession. The plaint was silent on the question as to with whom the ownership of the property legally rested.

Held, that the suit as laid had been rightly dismissed. Assuming it to be correct, that a plaintiff who alleges title as well as possession cannot be allowed to ask for a declaration as to his possession only, there being a further dispute between the parties as to the title, the suit would not lie.

But in any case, the proper decree for a Court to make upon a claim framed in the above manner, and leaving open the question of title, would be one declining to exercise its judicial discretion by making any such declaration, the effect of which would be to leave the real matter of dispute between the parties undealt with and undisposed of.

Further appeal from the decree of Khan Muhammad Hayat Khan, O.S.I., Divisional Judge, Mooltan, dated 9th August 1890.

Grey, for appellants.

Rattigan, for respondent.

This was a suit for a declaratory decree. The frame of the suit sufficiently appears from the head note.

The following judgments were delivered—

BENTON, J.—The judgment of the first Court contains a pretty 22nd Jan'y. 1892. accurate translation of the plaint. The prayer of the plaint is that a declaratory decree be passed in the plaintiffs' favour to the effect that they are in possession of the entire land as laid

down in the first paragraph of the petition of plaint, and that mutation of names in respect of eight shares of it, which has been sanctioned in favour of the defendant, should not affect their rights (properly possession), and that the land in their possession amounts to 398 ghumaos, 6 kanals, 6 marlas. The first paragraph thus referred to runs—"The plaintiffs are in possession and are proprietors of 598 ghumaos, 2 kanals, 2 marlas of land." It is admitted further on in the plaint that two deeds of sale were executed for eight out of twelve shares of the land in favour of the defendant—one dated 22nd March 1877 for Rs. 1,950; the other dated 8th June 1879 for Rs. 800. It was alleged that, in consequence of full consideration not having been paid, the defendant was never put in possession. The plaintiff, Muta Ali, who acted for all the plaintiffs in the first Court, admitted that the whole of the consideration had been paid on the latter deed, but he stated that Rs. 400 or Rs. 450 remained due on the prior one. The plaintiffs were five brothers. They were all parties to the prior deed. They were all parties to the second deed, save Muta Ali and another named Hassan.

The defendant pleaded that the suit under Section 42 of the Specific Relief Act did not lie; that separate suits should have been brought in respect of each deed; that the sales had been completed in every way, full consideration having been paid; and that he had been in possession up to date.

Two issues were drawn, one as to the plaintiffs' possession, and another as to a portion of the consideration having remained unpaid. The first Court found on both issues for the defendant, and dismissed the plaintiffs' claim with costs.

In appeal to the Divisional Judge, the plaintiffs impugned these findings of fact and the evidence on which they were based. The Divisional Judge stated the facts of the case as if the defendant had been in possession, and then he went on to state the points for decision, which, according to him, were—

1. Can the plaintiffs under the Specific Relief Act bring a suit like the present one?

2. If the plaintiffs really obtained the consideration money, less Rs. 450, as alleged by them, are they entitled to the decree sued for?

On these issues he found that the suit as laid was barred by the Full Bench Ruling (*Punjab Record*, No. 12 of 1888), and

that if any part of the consideration remained unpaid, the plaintiffs might sue for it. He accordingly dismissed the appeal.

The case is appealed to this Court on the ground that the suit is maintainable under Section 45 of Act XVII of 1887, because the plaintiffs allege a title as well as mere possession, and that the plaintiffs' possession was proved by the evidence. The learned counsel for the appellants explained that it was not intended in the plaint to claim a decree declaring that the plaintiffs were proprietors of the land in suit, but only a decree declaring that they were in rightful possession as holding a lien for unpaid purchase-money, and entitled to have the order of mutation in the defendant's favour set aside as prejudicial to their rights.

It may be observed that the decree which the plaintiffs prayed for, so far as it regards the mutation of names in favour of the defendant, that it should not affect the plaintiffs' possession, is one which in the nature of things could not be passed. A mutation entry is made under the orders of a Revenue Officer, the Civil Court is barred from interfering with it under Section 158 of the Land Revenue Act, and under Section 44 it is presumed to be true until the contrary is proved or a new entry is lawfully substituted for it. Section 45 of the Act indicates that if any one is aggrieved by any such entry, he may sue for a decree under Chapter VI of the Specific Relief Act, which deals with the subject of declaratory decrees. It would thus appear to be indicated that any damage which such an entry might cause may be redressed by a declaratory decree to a contrary effect. No doubt a new entry would be made by the Revenue authorities in place of the entry objected to, in accordance with any final decree implying that the former entry was wrong. It is erroneous to suppose that the Civil Court could either order a new entry to be made in the revenue records, or that it could remove the effect in evidence, or otherwise, of any entry that may be made.

Such an entry and the conduct of the party in whose favour it is made may, however, be a good reason for asking the Civil Court to use the discretionary power it has of making a declaratory decree with a view to removing its evil or unjust effect. We have, then, to see whether there is good reason for granting a decree declaring that the plaintiffs are in possession of the land sold as of right on account of their lien for unpaid purchase-money. We must assume, for the moment, that the

plaintiffs have been in possession hitherto, and there is purchase-money unpaid. Under these circumstances, have the vendors a right to retain possession? It is understood that, unless this right exists, the plaintiffs are not entitled, with reference to Full Bench Ruling, *Punjab Record* No. 12 of 1888, to any decree declaring the fact of their possession. We are dealing, it must be remembered, not with a contract of sale, but with a completed conveyance by which the property in the land has passed to the defendant, and in which it is alleged that possession has passed and the price been paid in full in opposition to the hypothesis with which we are dealing. The appellants' counsel did not quote any authority in support of his contention. The counsel on the other side pointed to the principle embodied in Section 55 (4) (b) of the Transfer of Property Act, which, indicating the rights of the seller, lays down that he is entitled, "where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in his hands for the amount of the purchase-money, or any part thereof remaining unpaid." This, it may be observed, does not deal with the case supposed, but with a different case, *viz.*, when possession has passed. With regard to the possession, however, it is laid down in a previous part of the section, not that the seller may retain it, but that he is bound "to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits." In Story's Equity Jurisprudence, edition 12, paragraph 506, it is said: "A lien is not in strictness either a *jus in re*, or a *jus ad rem*; but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged." Again, at paragraph 1221, the origin of the lien of the vendor is traced to the Roman law, and the rules of Roman law are set forth. Among other rules of that law, we find it stated that, although the sale passed the title and dominion of the thing sold, yet it also implied a condition that the vendee should not be master of the thing so sold unless he paid the price, or had otherwise satisfied the vendor in respect thereof. Further on it is said: "The rule was equally applied whether there had been a delivery of possession to the vendee or not. If there was no such delivery of possession, then the vendor might retain the property as a pledge until the price was paid." I have been unable to find, in the further discussion of the subject by the learned author, or in any other authority, that this rule of Roman law has been adopted in English law, or that, if it were, it is applicable to this country.

What the plaintiffs are entitled to is to have the terms of the transfer carried out if they be still legally enforceable. According to the conveyance, possession was supposed to have been delivered and the price was supposed to have been paid. If these conditions have not been complied with, they should be now enforced *pari passu*, if this can be done according to law, as the time for compliance in regard to both has long passed. Even supposing the plaintiffs were originally entitled according to law to retain possession in consequence of their lien, it does not appear that they can have a right at this date to have it declared that they are in possession and have a right to retain possession in consequence of this lien, seeing that under Article 111 of Schedule II of the Limitation Act their remedy under it was long ago barred. I am, therefore, of opinion that the particular ground on which the plaintiffs have based their title to possession of the property in suit is not sustainable, and that, accordingly, under the Full Bench Ruling, No. 12, *Punjab Record* of 1888, the suit as laid cannot be maintained.

It is obvious that if the assumptions made in the above argument could be established as facts, the plaintiffs would be entitled, under Section 28 of the Limitation Act, not merely to a declaration that they are entitled to remain in possession with a view to enforcing a lien for a portion of the purchase-money, but that they have, since the ownership passed under the deeds to the defendant, acquired a title by adverse possession, and that they are owners of the land. They have, however, advisedly set up no such claim, and it is unnecessary to consider what their position would have been if their suit had been in this form, or how it should have been dealt with.

I would, for these reasons, affirm the decree of the lower Court and dismiss the appeal with costs.

RIVAZ, J.—I concur in the conclusion that the suit as laid 22nd Jany. 1892 has been rightly dismissed.

The plaint, as I understand it, alleges that the plaintiffs are owners and in possession of certain property: that two deeds of sale were executed by them in 1877 and 1879, purporting to convey portions of the said property to the defendant: that defendant never got possession under the said deeds, as the full consideration money was never paid by him: that, notwithstanding this fact, the defendant has succeeded in obtaining *dakhil kharij* from the revenue authorities, which is calculated to cause injury to the plaintiffs, though it has not ousted them from actual possession: and that the plaintiffs,

therefore, pray for a declaratory decree *that they are in possession of the entire land*, and that the mutation in defendant's favour will not affect their rights of possession.

As I construe the plaint, it studiously abstains from submitting for the consideration of the Court the question as to with whom the *ownership* of the property legally rests. Now if, as ruled in Civil Judgment No. 12, *Punjab Record* of 1888, Section 42 of the Specific Relief Act does not allow of a suit for a declaration that a plaintiff, who alleges no title, is in possession of certain property, and has the benefit, or is entitled to the benefit arising from the fact of such possession, I should be disposed to hold that, *a fortiori*, a plaintiff who alleges title as well as possession cannot be allowed to ask for a declaration as to his possession only, there being a further dispute between the parties as to the title. But if I am wrong in the above view as a matter of strict law, I should certainly hold that the proper order for a Court to pass upon a claim asking, under the circumstances already explained, for a declaratory decree as to possession, and leaving open the question of title, would be one declining to exercise its judicial discretion by making any such declaration, the effect of which would be to leave the real matter of dispute between the parties undecided with and undisposed of.

The appeal is dismissed with costs.

Appeal dismissed.

No. 49.

BHAI BHAGAT SINGH AND BHAIR HIRA SINGH,—
(PLAINTIFFS),—APPELLANTS,

APPELLATE SIDE. {

Versus

HARNAM SINGH,—(DEFENDANT),—RESPONDENT.

Case No. 34 of 1890.

(RIVAZ & STODDON, JJ.)

*Golden Temple, Amritsar—Succession of gaddi-nashin—Custom as to—
Survivorship.*

In determining the right of succession to the office of *gaddi-nashin* the only law to be observed is to be found in the custom and practice, which must be proved by evidence.

Hitherto, the rule of succession in the case of the Darbar Sahib, or Golden Temple, at Amritsar has been that the *guddi-nashins* have nominated successors, who have been installed in each case without objection.

Held, that no good grounds existed for applying the doctrine of survivorship to a case such as this, there being no analogy between three *gaddi-nashins* who were to all intents and purposes separate and not joint, and the case of an undivided Hindu family among whom the doctrine of survivorship prevails.

Held, also, that it would not be just or equitable to reduce the customary number of *gaddi-nashins* from three to two, merely to benefit the plaintiffs and to the detriment of the institution and its supporters.

First appeal from the decree of Carr Stephen Esquire, District Judge, Amritsar, dated 11th October 1889.

Rattigan and Rallia Ram, for appellants.

Higgins, for respondent.

This was a suit by two *gaddi-nashins* of the Darbar Sahib, or Golden Temple, at Amritsar, claiming to be the rightful successors of the third *gaddi-nashin* (Jowahir Singh) who had died.

The facts and arguments are set out at length in the judgment of the Chief Court which was delivered by

RIVAZ, J.—The arguments in this case occupied the greater 29th Feb. 1892. portion of two days, and we reserved our judgment, as the record is voluminous, and the case both an important and a troublesome one. I have now been able to peruse carefully the whole of the printed record prepared in this Court. I have not thought it necessary to refer (further than was done in Court at the hearing) to any papers not printed at the request of either party from the connected files. The printed record as it stands appears to me substantially complete, and both parties, who have been represented throughout by competent advisers, are well aware of the rule of this Court, under which intimation is given to the parties in first appeals that the hearing will be restricted to the documents comprised in the printed records.

The plaint, so far as it is material to the case at the present stage, sets out that the plaintiffs (Bhais Bhagat Singh and Hira Singh) were with one Bhai Jowahir Singh (deceased) the joint *gaddi-nashins* of the Darbar Sahib, also known as the Golden Temple at Amritsar. That Jowahir Singh died on the 14th November 1885 without having appointed any *chela* or successor. That on the 27th November 1886, the defendant, Bhai Harnam Singh, brother of the deceased, was arbitrarily placed upon the *gaddi* and in possession of the property and

rights connected therewith by Sardar Man Singh, the Manager *sarbarah* of the Darbar Sahib. That such an appointment is opposed to the custom of the institution, defendant being, moreover, morally unfit for the post, as he was once convicted of gambling. The plaintiffs, therefore, prayed that the defendant's succession being considered unlawful, he might be dispossessed from the *gaddi* and possession be given to the plaintiffs, and that the latter be declared *gaddi-nashins* in place of the deceased, and that any further relief which the Court might think proper be also awarded. In their supplementary statements the plaintiffs made it clear that they claimed to succeed Jowahir Singh by right of survivorship, the *gaddi* being joint, and Jowahir Singh having died without appointing any lawful heir or successor.

The gist of the defence was that there was only one real *gaddi-nashin*, namely, the deceased, Jowahir Singh; that plaintiffs were mere subordinates remunerated by a share in the offerings; and that plaintiffs had no right to the *gaddi* by survivorship, or otherwise, even if the allegation that Jowahir Singh had left no lawful successor was correct. Further, the defendant contended that as brother and *chela* of Jowahir Singh, he was the lawful heir by law and custom; that he had (in accordance with ancient custom) been duly appointed by the *sants*, *mahants*, *pujaris*, and the Darbar Committee, and could not, therefore, be displaced, he, moreover, being in every way morally fit for the post.

It may conveniently be stated here that the defendant, Harnam Singh, when examined as a witness (No. 2) for the plaintiffs, distinctly admitted that he did not rely upon any nomination of himself as successor made by Jowahir Singh during his lifetime, nor upon his maternal relationship to Jowahir Singh, but on the fact that he was Jowahir Singh's *chela*, and as such was chosen after Jowahir Singh's death by the brotherhood or community, and installed by orders of the Darbar Committee, with the concurrence of the said general body.

Issues were fixed by the officer (Diwan Ram Nath) who first took up the case, and, in fact, recorded all the evidence, and the same were re-stated in a different form by the District Judge (Mr. Carr Stephen) who finally disposed of the case. The plaintiffs' suit was eventually dismissed, and the plaintiffs are, therefore, the appellants in this Court, the defendant having also put in a cross-objection on the question of costs only.

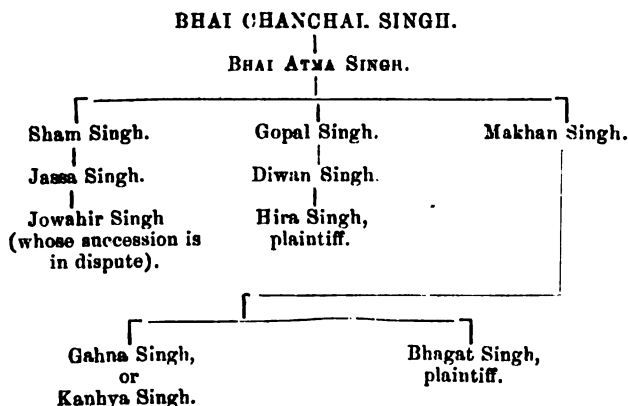
The questions raised by the appeal to this Court, stated as briefly as possible, appear to me to be—

- (1.) Whether the plaintiffs have made out their right to succeed, in the event of it being found that Jowahir Singh died without having any lawfully appointed successor, or any person whom custom recognises as eligible to succeed in default of such appointment?
- (2.) If so, whether defendant has lawfully succeeded to the *gaddi* upon the grounds relied upon by him?
- (3.) If not, to what remedy, if any, are plaintiffs entitled?

It will be observed that the plaintiffs' claim, as laid, is based entirely upon their own right of succession. At the same time it appears to have been conceded in the lower Court that, even if the plaintiffs could not make out their own right to succeed, they might be entitled to ask the Court to dispossess the defendant upon the ground that he, too, had failed to make out his title. The District Judge in his judgment, after disposing of the plaintiffs' claim, so far as it relates to their own title to succeed, proceeds (referring to the fifth issue which raised the question whether defendant was Jowahir Singh's duly elected successor): "The question involved is "whether the defendant is the lawfully elected successor of "Jowahir Singh. *The defendant has not challenged the plaintiffs' right to raise this question*, and its disposal involves the "consideration of three different questions." In the argument before us, no special exception was taken to the statement contained in the words above italicised, and I think the remark is justified by a perusal of the pleadings, and the written arguments submitted in the first Court. I confess that if the matter had been properly pressed at the proper time, I should have entertained considerable doubt whether the plaintiffs' claim, as laid, entitled them to do more than succeed, if they could, upon proof of their own title as successors by right of survivorship to Jowahir Singh, deceased, it being questionable whether they could be allowed in the present suit to obtain a mere declaration that defendant has no valid title, or a decree for his ejectment upon that bare ground. But I have thought it best to dispose of the whole case as it was presented to us at the hearing, reserving, of course, the right to decide what would be the nature of the decree

which could properly be granted to the plaintiffs in the event of their failing to establish their own right to succeed by survivorship, but succeeding in affirmatively establishing the invalidity of defendant's title.

The first two questions noted above may conveniently be discussed together, for each involves the main point in the case, namely, as to the rule of succession prevailing in the institution with which we are dealing. In determining this question, as pointed out more than once by their Lordships of the Privy Council, the only law to be observed is to be found in custom and practice which must be proved by evidence. Moreover, the claimant must show that he is entitled, according to the custom, to recover the property for which he is suing, it not being sufficient to rely upon the infirmity of the title of the defendant, who is in possession (*vide Genda Puri v. Chatar Puri*, I. L. R., 9 All., 1, and the earlier cases therein cited). Unfortunately, a labourious study of the very voluminous record in the present case discloses a very meagre amount of information upon the very points with regard to which it would be most satisfactory to have full and certain knowledge. The following table indicates the persons who, so far as can be ascertained, have occupied the position of *gaddi-nashins* of the Darbar Sahib at Amritsar :—



At the very outset, however, there is a difficulty in determining the exact point of time when the *gaddi* ceased to be exclusively occupied by one sole *gaddi-nashin*, and was divided (as it certainly was at the time of Jowahir Singh's death) among three incumbents. The point is not of vital importance, and I will state what appears to me to be deducible from the evidence, oral and documentary, as briefly as I can. I think it

is clear that both Chanchal Singh and Atma Singh exercised an undivided sway. I am also inclined to believe that Sham Singh succeeded in the first instance to the sole authority. How the authority came to be divided appears to me to be somewhat in this way. No doubt from the earliest times the *gaddi-nashin* would be assisted in his less important duties by his disciples and other subordinates, and it is probable that some of these would be entrusted with more important duties than others. It seems to me that in the days of Sham Singh, Gopal Singh and Makhan Singh managed in this way to obtain such influence that possibly, during Sham Singh's lifetime and at all events after his death, they had themselves obtained the footing of something more than mere assistants, so that when Sham Singh died they succeeded in getting themselves recognised along with Sham Singh's successor, Jassa Singh, as *gaddi-nashins*, entitled to share with the direct representative of the original branch the duties and profits of the *gaddi-nashini*. At all events, we find from documentary evidence that in 1850-51 Jassa Singh, Makhan Singh and Gopal Singh were all established as *gaddi-nashins*, with rights which were very nearly equal, if not altogether so. In 1851, Makhan Singh (who appears to have been the most litigious of all the *gaddi-nashins*) laid claim to share in a *jagir*, which then stood in the name of Jassa Singh only. The suit was compromised, Jassa Singh agreeing to allow Makhan Singh the same payments in cash and kind out of the *jagir* as he was already allowing to Gopal Singh. Both Jassa Singh and Gopal Singh must have died soon after this date, for in 1859-60 we find Jowahir Singh, Makhan Singh and Dewan Singh figuring in the records of cases as the three *gaddi-nashins*, Makhan Singh, as usual, being foremost in the fray. Jassa Singh, we know, died in 1856, as will appear later. We also know that in 1855 Makhan Singh, finding himself too old to discharge the duties of his office, appointed his son Gahna (Kanhya) Singh as his successor during his own lifetime. There was a suit about this appointment, but Makhan Singh eventually gained his point. Gahna Singh, however, died before his father, and it appears that Makhan Singh then resumed his seat on the *gaddi* up to the time of his own death, which took place in 1863. In 1866, we find Jowahir Singh, Dewan Singh and Bhagat Singh in undisputed occupation of the *gaddi*. Again, by 1870 Dewan Singh had been replaced by Hira Singh, and so matters remained up till the recent death of Jowahir Singh. The above information is obtained almost entirely from allusions found in the records of decided cases. It is not, I fear

very precise or explicit, but I have not been able to make it more so, after a perusal of the whole record. One thing is, I consider, perfectly clear, and that is that defendant's plea, that Jowahir Singh at his death was the sole *gaddi-nashin*, is quite unmaintainable. For two or three generations there have certainly been three occupants of the *gaddi*, each of whom has on his death been succeeded by his heir or nominee. As to the exact rule governing such succession, the record is hopelessly vague. All, I think, that can be certainly deduced from the mass of undigested matter is that the usual custom was for the *gaddi-nashin* during his lifetime to nominate, either expressly or by implication, a *chela* or relation as his successor, and that such nomination was usually accepted by the brotherhood—the *sants, mahants, &c., &c.*, so frequently referred to throughout the record. I am not prepared to hold it established that it was absolutely necessary that a *chela* should be nominated, or at least a *chela* who had been made a *chela* by any particular form or ceremony. There is no evidence that I can discover which clearly explains what this important process of appointing a *chela* really is. I understand that the ceremony of receiving *pohal* is the ceremony of baptism into the Sikh religion, and that in this way, and in one sense, every Sikh becomes the *chela* of the *guru* who has initiated him. What the special ceremony is by which a *gaddi-nashin* appoints a *chela* with a view to his succeeding to the *gaddi*, I have been quite unable to discover, and I doubt if any particular custom upon this point exists. As far as appears from the evidence, a *gaddi-nashin* has hitherto been allowed to appoint either a *chela* or a blood relation as his successor, and hitherto the nomination has been accepted without objection. I gather that the succession in the direct line from Bhai Chanchal Singh to Jowahir Singh has always passed from *guru* to *chela*, whereas in Gopal Singh and Makhan Singh's lines a blood relation has in each case succeeded. But the fact is that there is very scanty evidence forthcoming as to the actual facts of any of the successions which have hitherto taken place: except in the case of the successions to Jassa Singh and Makhan Singh, the record is practically silent. Jassa Singh died, as already stated, in 1856. Shortly before his death he executed a deed of gift in favour of Jowahir Singh, whom he describes (not as his *chela*), but as one whom he has brought up from infancy and treated as a son. Nor does the document distinctly appoint Jowahir Singh as the writer's successor to the *gaddi*. It appears, however, to have been acted upon after Jassa Singh's death as evidencing some

such appointment, for an endorsement upon the original deed shows that it was accepted at the time of the installation of Jowahir Singh, as indicating the wishes of the deceased that such instalment should take place. The defendant relies upon this gathering of the brotherhood, the *sants*, *mahants*, *pujaris*, &c. as showing that election is the real rule by which the succession to the *gaddi* is determined. It is, I think, quite impossible to hold that there is any sufficient evidence that such is the established custom. In each case, where we find a reference made to the assembling of the brotherhood, the assembly seems to have taken place merely to instal an already nominate successor, rather than with a view to electing such successor. As to the succession to Makhan Singh, his successful attempt to put in Gabna Singh as *gaddi-nashin* during his lifetime has already been alluded to. The decision of this Court reported as No. 4. *Punjab Record* of 1870, gives us some information as to what occurred after his death. "Before the death of Makhan Singh," the judgment recites, "Bhagat Singh performed the duties of *granthi*, and he continued to do so after his grandfather's death, receiving no extra share in the profits of his office for so doing, but dividing what he received with his cousins." The decision, however, was to the effect that the office of *gaddi-nashin* was not a descendible inheritance, and that the plaintiffs (Bhagat Singh's maternal relations) had no valid claim to share in the offerings. It further appears that in this case the plaintiffs had attacked the validity of Bhagat Singh's appointment, and the judgments show that the Courts were very doubtful as to whether he had been regularly appointed. I should infer from the available information upon this point, that at all events no ceremonial appointment of Bhagat Singh as *chela* or successor by Makhan Singh could be shown. The most, then, that I consider that the plaintiffs can be held to have established as to the rule of succession is that hitherto the *gaddi-nashins* have nominated successors, who have been installed in each case without objection. When, therefore, the plaintiffs attempt to argue that they are the true successors in the present case by right of survivorship, they are at once met with the objection that they have failed to prove that any such principle can be held applicable to the present case. No such custom can be established, inasmuch as on plaintiffs' own showing the exact complication that has now arisen has never arisen before. And, as the only law to be observed in the case is to be derived from custom and practice, which the plaintiffs must affirmatively prove, they must be

held to have failed to establish their main point upon any ground that can be accepted. But I would add with reference to the argument that in the absence of custom the law should be applied, and if not the law, then justice, equity and good conscience, that I can find no good ground for applying the doctrine of survivorship upon either view. There is, to my mind, no analogy between the three *gaddi-nashins* with whom we are now dealing, and who are to all intents and purposes separate and not joint, and the undivided Hindu family, among whom the doctrine of survivorship holds good. Nor, to my mind, would it be just or equitable to reduce the customary number of *gaddi-nashins* from three to two, merely to benefit the plaintiffs and to the detriment of the institution and its supporters. I have not laid much stress upon the oral evidence of the plaintiffs' witnesses, though I have carefully analysed the statements of all seventeen. For each admits that the question which the plaintiffs propound has never hitherto arisen, and each gives merely his own opinion of what would be a good rule to follow in the present emergency. But I notice that very few of the witnesses commit themselves to the opinion that plaintiffs should take by survivorship under the present circumstances, though many try to make out that plaintiffs should select a successor acceptable to themselves. I am quite clear, therefore, that plaintiffs cannot get a decree in the present case giving them possession, as the lawful successors to Jowahir Singh, deceased, and this leads to a consideration of the question of defendant's title to succeed.

Here, again, I consider that the burden of proof is still upon the plaintiffs. They cannot claim to displace the defendant until they prove that his occupation of the *gaddi* is contrary to the custom of the institution. Had the plaintiffs succeeded in their contention, that no one could by custom sit upon the *gaddi* unless (a) he was appointed by the last occupant, or (b) he was that last occupant's *chela*, in some proved sense,—that is appointed in some special manner,—then I think it would lie upon the defendant to make good his plea that he was Jowahir Singh's *chela*, appointed in the special manner that he alleges. But, as I have already held, I can find no convincing evidence of any special ceremonial appointment as *chela* being necessary to qualify for the post of *gaddi-nashin*. At the same time, I entirely disbelieve the evidence that defendant now produces to establish, that on a certain day (the Dasehra of Sambat 1933=23rd September 1876) Jowahir Singh, by a

special ceremony in his own Akal Bunga, and in the presence of witnesses, constituted defendant his *chela* with a view to his succeeding him. It was urged with a good deal of force that it is impossible to credit this evidence in face of the statement which defendant himself made before the Committee of Management in October 1886, to the effect that he became Jowahir Singh's *chela* sixteen years before that date. In reply to this, certain members of the Committee pointed out that there was a statement of Bhup Singh (the defendant's maternal father) made as late as 1876, which indicated plainly that up to that time Jowahir Singh had not appointed Harnam Singh as his *chela*. In the present case, therefore, we find defendant going back from his earlier statement and attempting to prove an appointment as *chela*, which would be consistent with his father's deposition. Moreover, it seems clear that when defendant, soon after Jowahir Singh's death, urged his claims in a written petition to the Deputy Commissioner, he never mentioned that he was a *chela* of the deceased, and entitled as such to succeed him. Again, at an early stage of the present case, defendant was questioned with a view to eliciting from him the precise date upon which the alleged ceremony took place, but he refused to reply upon the point, presumably because he had not even then finally arranged what was to be the exact occasion of the appointment. I think, therefore, that defendant has failed to prove either that Jowahir Singh made him his *chela*, or that, if he had, this alone would suffice to establish the validity of his title to the *gaddi*. I have already stated that I do not consider that any custom of selection is made out. But what I consider defendant has proved is this, that he used to assist Jowahir Singh during his lifetime in the performance of some of the duties of his office; that he is not morally disqualified from being a *gaddi-nashin*, though he was in 1880 once convicted under the Gambling Act; that he has not usurped the *gaddi* forcibly, but has been installed (apparently without objection) by the Manager of the Darbar Committee acting, not arbitrarily, as alleged by plaintiffs, but under a vote of a majority of the Committee acting in meeting convened for the purpose; and that his appointment is not *opposed* to any known custom of the institution. If the burden of proof lay upon the defendant proof of the above facts might be held insufficient to discharge it. But, as already indicated, the onus is on the plaintiffs to prove the specific rule of custom under which the

defendant must be ejected, either to make way for themselves, or for somebody else, who, after custom has been duly complied with, can be appointed lawfully to succeed. Otherwise, the defendant must remain where he is, however infirm his own title. Feeling, as I do, that it would be impossible to decide upon the present record that plaintiffs can be allowed to absorb the present vacancy, it would clearly be most mischievous to give them a decree enabling them to eject the defendant, and yet leaving the matter undecided as to the person to take his place. The executive authorities and the Darbar Committee have at least attempted to act reasonably and constitutionally in the matter. No doubt no one would seriously listen to plaintiffs' plea that they should get the appointment, for it should be noted that the powerful Sikh Sardars who opposed Harnam Singh's appointment, voted not for plaintiffs, but for a third party. But I consider that their claim might rightly be regarded as *prima facie* unreasonable, and the record of the present case discloses that they have utterly failed to make it good. The Committee have considered the claims of all who chose to put such in, and by a majority of six to three have installed the defendant, who, there is at least some evidence to show, is a *persona grata* with the community at large. It is, I think, no great misfortune that such a person cannot be displaced even though the validity of his appointment according to the custom of the institution is doubtful.

The above view of the case appears to me to render it unnecessary to deal with certain questions, which were hotly contested before us in the argument. I lay no particular stress, for instance, upon the *mahzarnamas* produced by the defendant, which in a half-hearted sort of way he wished to rely upon (1) as proof of certain facts stated therein; (2) as evidencing an election or appointment of himself by the brotherhood or community at large. I am not prepared to hold, as contended for the plaintiffs, that these documents are absolutely inadmissible in evidence; but I consider that they are of no value, as evidence, except perhaps to indicate (for what it is worth) that the signatories had no particular objection to defendant's appointment. I should mention that the *dastur-al-amal*, or book of regulations for the Darbar Sahib, compiled in 1859, a copy of which has been filed by the defendant, throws no light whatever upon any of the matters seriously in contest in this case. It is absolutely silent as to the history or customs of the institution, or as to the rule of succession, and

merely deals with certain questions of management immaterial to the present litigation. Lastly, I have not thought it necessary to discuss various minor points relied upon as proving or disproving that defendant was *chela* of Jowahir Singh, deceased. I am so satisfied that the direct evidence on this point produced by the defendant cannot be relied upon, that it is unnecessary to carry the question any further.

On the whole case, I consider that the plaintiffs are not entitled to any relief, inasmuch as they have failed to prove either that they are themselves the rightful successors to Jowahir Singh, or that the defendants continuance in the office of which he is in actual possession is opposed to any customary rule governing the institution. So far as I can judge, the present case has never hitherto arisen: and I consider that it is not enough for the plaintiffs to show that defendant's succession cannot be justified by and proved usage. It is obvious that there must be some mode of appointing a new *gaddi-nashin*, say, for instance, in the event of all three *gaddi-nashins* dying without nominating a successor, and I therefore think that plaintiffs must prove either that defendant's succession is *opposed* to some proved usage, or at least that he has been appointed in some purely arbitrary and unreasonable manner or has forcibly taken possession, or has got in a way which the principles of justice, equity and good conscience compel the Court, not only to refuse to recognise, but actively to counteract. As no such facts as above have been made to appear, I would dismiss this appeal with costs, and I would deal with the respondent's cross-objection by holding that the first Court's order as to the costs of that Court is reasonable and should not be interfered with.

STODDON, J.—I concur.

29th Feby. 1892.

Appeal dismissed.

No. 50.

MUSSAMMATS KISHNO AND PARTAPO,—(PLAINTIFFS),
—APPELLANTS,
Versus
RAMAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Case No. 383 of 1891.

(BENTON & RIVAZ, JJ.)

Custom—Unmarried daughter—Maintenance out of or succession to deceased father's estate—Hindu Jats, Ludhiana District.

Found, that among Hindu Jats of the Ludhiana District, custom recognises the right of the unmarried daughters, to be maintained out of

the estate of the deceased father, and even in some cases a right to possession of the estate until marriage.

Further appeal from the decree of G. Leslie Smith Esquires, Divisional Judge, Umballa, dated 20th December 1890.

The parties were Hindu Jats of the Ludhiana District. The only question of importance was as to the rights of an unmarried daughter to be maintained out of her deceased father's estate.

The judgment of the Chief Court was delivered by
 27th Jany. 1892. RIVAZ, J.—The parties are Hindu Jats of the Ludhiana district. A soulless proprietor, named Karma, died on the 12th October 1887, and his widow also died about a month and a half later *Dakhil kharij* took place in favour of Karma's collaterals related in the sixth degree (defendants Nos. 1—20 in the present case), the claims of one Kaku Singh, who set up a title as adopted son, having been disallowed. The present plaintiffs, the minor daughters of Karma, also put in a claim through a relation, Mussammat Saddan, but were referred to a regular suit. This was in June 1883. On the 20th July 1889, defendants Nos. 1—20 sold the land which they had obtained as Karma's heirs to defendants No. 21—23 for Rs. 2,500. The daughters of Karma, therefore, bring the present suit to establish: (1) that they are the lawful heirs of Karma and entitled to succeed in preference to the collaterals: (2) that in the event of this not being established, they are entitled to be maintained and to have their maintenance made a charge upon the property in the hands of the purchasers. There were other items of claims, which need not be mentioned as they are not now material.

We think it clearly proved that the property in dispute is ancestral property, and that no custom is established by which the daughters can succeed, in the presence of collaterals related in the sixth degree. The lower Courts have decreed the plaintiffs, as against defendants Nos. 1—20, a cash maintenance at the rate of Rs. 4 per mensem for each plaintiff, with a right of residence in a house, and have made a further provision for the expenses of the plaintiffs' marriages. The defendants have accepted this decree, so that the only material question remaining for decision upon plaintiffs' appeal is whether the maintenance decreed should not be made a charge upon the property in the hands of defendants No. 21—23. It is probable, though not perhaps certain, that the latter knew of the existence of the daughters, and their right to be maintained.

out of the ancestral property. But be this as it may, we consider it sufficiently established that among Hindu Jats of this locality custom recognises the unmarried daughter's right to be maintained out of the estate of the deceased father (*vide* page 61 of Walker's Customary Law of the Ludhiana District), and that she has even in some cases a right to possession of the estate until her marriage.

We therefore accept this appeal, and vary the decree of the lower Court by adding a proviso to clauses (2) and (3) thereof, that the amounts therein referred to are further declared to be a charge upon the land in suit in the hands of defendants Nos. 21—23. Each party will pay his own costs in this Court.

Decree varied.

— — —
No. 51.

MAYA SHAH AND BHAWANI SHAH,—(PLAINTIFFS),—
APPELLANTS,

Versus

FEROZDIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1084 of 1890.

(RIVAZ & STODDON, JJ.)

Regulation XVII of 1806—Service of notice—Service on each mortgagor.

To establish a sufficient compliance with the provisions of Regulation XVII of 1806, it is necessary that, if there be more than one mortgagor, each mortgagor should be served with a copy of the mortgagee's petition to foreclose, service upon one of the mortgagor's alone being inadequate.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 4th July 1890.

P. C. Chatterjee, for appellants.

Bates, for respondents.

The question raised by this appeal was as to the compliance by the plaintiffs with the provisions of Section 8 of Regulation XVII of 1806 as to giving of notice of foreclosure to the mortgagors.

The facts sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—The first set of notices are not relied upon, and 4th Feby. 1892. ightly, for though they appear to have been served on all three

defendants, the said notices (on perusal) appear to be materially defective, as they do not state that if the mortgagors fail to redeem within one year, the mortgage will be finally foreclosed.

The second set of notices appear to be in proper form, but the question is whether there is proof of due service upon all three defendants. The *purwanas* themselves show that only one defendant, viz., Nizam Din was actually served by the process-server, and there is no sufficient evidence that the other defendants were ever furnished with the copy of the application or the notification required by the Regulation. That Nizam Din told his brothers that foreclosure proceedings had been commenced is probable, as they all three appeared in Court on the 11th June, but something more than this must be proved, to establish a sufficient compliance with the Regulation, see I L. R., 3 Calc. 397, and 11, Calc., III.

We cannot hold that the Divisional Judge's decision is erroneous, and we therefore dismiss the appeal with costs.

Appeal dismissed.

No. 52.

HAYAT MUHAMMAD AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE. }

Versus

FAZL AHMAD AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Case No. 854 of 1890.

(BENTON & RIVAZ, JJ.)

Custom—Awans of Rawalpindi Childless proprietor—Gift to grand nephew in presence of brother—Burden of proof.

Found that among Muhammadan Awans of the Rawalpindi District a childless proprietor is not competent, in presence of a brother, to convey his whole estate by gift to his grandnephews.

Semle.—In adjusting the burden of proof in such an alienation, the same rule applies as if the case had occurred in a part of the Province to which the Full Bench ruling, *Punjab Record*, No. 107 of 1887, is to be regarded.

Sham Lal, for appellants.

Morton, for respondents.

The plaintiffs sued for a declaration that an oral gift should not affect their right to succeed the donor. The parties were Muhammadan Awans of the Rawalpindi District, and the

question for consideration was, whether a childless proprietor was competent in presence of a brother to convey his whole estate by gift to his grand-nephews.

The judgment of the Court was delivered by

BENTON, J.—The parties to this case are Muhammadan *29th Jany. 1892.* Awans of the Rawalpindi District, and the question to be decided is, whether a childless proprietor is competent in presence of a brother to convey his whole estate by gift to his grand-nephews. The suit was brought by the brother to contest the alienation. Besides the ground that the donor, in accordance with the custom of the tribe and family, was not competent to make the gift, it was also contested on the ground that the donor was old and feeble, under undue influence, and incapable of comprehending what he was doing. This is still insisted on in this appeal, but, as we think, without any good reason. The donor appeared in Court at the first hearing of the case and satisfied it by his appearance, and his answers to questions, that he had full possession of his senses.

As regards the question of competency to alienate in accordance with custom, both Courts have decided against the plaintiff. The oral evidence is exceedingly conflicting, and it appears impossible to give a preference to one side over the other. Some files of decided cases were referred to, but they were decided a good many years ago, and no weight can be attached to them.

Under the circumstances the decision of the question must rest on general principles as to the burden of proof, and on the conclusions that may be extracted from the *Rivaj-i-am*. The answer given by the Full Bench Ruling, *Punjab Record*, No. 107 of 1887, had special reference to Hindu Jats inhabiting the central districts of the Punjab, but a very cursory examination of decided cases is sufficient to show that the restricted power of alienation prevails among most agricultural tribes living within much wider limits. If this case had arisen in the same tribe in a district further east, it would, no doubt, be incumbent on the alienees to prove that the alienation gave them a good title.

On the other hand, Muhammadan law has been applied to Awans in Bannu to set aside a will made in favour of one heir in *Punjab Record*, No. 121 of 1886. It was a question whether, according to custom, the Awan proprietor in question had not a power to bequeath his entire estate, but it was ulti-

mately decided that he was bound by Muhammadan law. In another Awan case from Peshawar, *Punjab Record*, No. 176 of 1886, it is stated that the Divisional and District Judges found that an Awan proprietor might even on his death bed bequeath the whole of his property to a stranger. The locality may, therefore, as regards the tribe in question and the power of alienation possessed by the proprietor, be regarded as a doubtful border-land. Further west the power probably exists unless it be controlled by Muhammadan law. Further east, generally, it does not unless justified by necessity.

Let us next consider what light is thrown on the matter by the *Rivaj-i-am*. The answer to Question 40 is explicit enough. A large number of tribes including Awans stated that sonless proprietors may make a gift of the whole, or any portion of their estates, without the consent of their kindred. The officer who prepared the record, however, throws doubt on the correctness of the answer, and is of opinion that a gift of the whole estate would not in any case be recognised when there are near relatives. This doubt is justified by the answers to Questions 41 and 42. In these answers the Awans stated that the gifts must be made to Awans only, and that their custom gave full power over acquired property and not over ancestral property. According to these answers there is, undoubtedly, not an unrestricted power of alienation by gift among Awans in the case of sonless proprietors. With regard to proprietors with male issue among Awans, the answers to Questions 1, 47, 48 and 54 go to show that a father must divide equally between his sons, but that he may alienate a certain portion of his land for charitable purposes. The conclusion to be derived from these last noted answers appears to be, that the proprietor with sons is governed very much by the rules prevailing further east, and may make alienations to take effect during his lifetime only for necessity. According to Question 38, a power to alienate by will without the consent of heirs was asserted by Awans and others, but the author disbelieved its correctness and gave reasons for his opinion.

Looking then to the general features of this customary law, partly certain and partly doubtful as regards the power of alienation, we find that, in the matters which are certain, there is no very decided difference between it and the customary law usually prevailing further east. We find the proprietor restricted on this hand and on that. He has a very limited power of interfering with the succession of sons to an equal share.

He may not make a gift save to members of his own tribe. It is very doubtful if he has any testamentary power such as is asserted. All these considerations go to show, I think, that in adjusting the burden of proof as to a contested alienation by gift, we should be guided by the same rule as we should be if the case had occurred in a part of the Province to which the Full Bench Ruling, *Punjab Record*, No. 107 of 1887, was expressly intended to apply, and we should hold that it was incumbent on the parties to the alienations to establish its validity in accordance with custom. The Divisional Judge in upholding the contested gift acted on a different rule. If the view I take as to the burden of proof be correct, undoubtedly the defendants have not discharged it.

I would, therefore, accept the appeal and grant the plaintiff a decree declaring that the oral gift in dispute shall not affect the plaintiffs' right to succeed to the donor, which appears to be the relief he is entitled to, and I would allow the plaintiff his costs in all the Courts.

RIVAZ, J.—I agree.

29th Jany. 1892.

No. 53.

GURDIT SINGH & OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

HAKIM,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 132 of 1890.

(BENTON & RIVAZ, JJ.)

Custom—Sale without necessity to collateral—Burden of proof.

A childless proprietor sold his land to the plaintiff, a collateral relation who lived with him, and then died. The plaintiff sued the other collaterals, who, like himself, would be entitled to inherit along with him but for the sale, to recover possession of the land.

Held, that the alienation without necessity was bad by custom and that the burden of proof was upon the plaintiff to support the sale.

Further appeal from the decree of T. O. Wilkinson Esquire, Divisional Judge, Amritsar, dated 7th January 1890.

Lal Chand, for appellants.

Morton, for respondent.

This was a case of alienation— a sale to a collateral without necessity. The question for decision was as to its validity by custom and the incidental question of burden of proof.

The judgment of the Court has delivered as follows by

29th Jany. 1892.

BENTON, J.—In this case a childless proprietor had recently sold his land to the plaintiff, a collateral relation, who lived with him, and he has since died. This suit was brought by the plaintiff against other collateral relations, who, like himself, would be entitled to inherit along with him but for the sale, to recover possession of the land of which they have taken possession.

It was asserted by the plaintiff that a sonless proprietor had an absolute power of alienation—that is to say, that he might alienate without necessity. The first Court found against him on this question. It also found against him that no necessity for alienation was established, and it accordingly dismissed his claim. In deciding the question of custom, it laid the burden of proof on the plaintiff.

The Divisional Judge, citing *Punjab Record* No. 59 of 1889, was of opinion that the burden of proof was wrongly thrown on the plaintiff, and that it should have been laid on the defendants. He ordered a further inquiry, and directed that, in determining the question of alienation, the defendants should be required to prove that the vendor does not possess an unrestricted power of alienation. The return to this inquiry was that the defendants had failed, and the plaintiff's claim was decreed by the Divisional Court. An appeal was instituted in this Court, and before it was admitted to a hearing by a Bench, a further remand was ordered for further inquiry on the question: "Whether the deceased was empowered by custom to alienate with or without necessity to a collateral in the 'presence of collaterals nearer in degree,' supposing the burden of proof lay on the plaintiff, who ascertained the validity of the alienation.

The different inquiries which have been held leave no doubt that, however the burden of proof may be adjusted, the ordinary rule applies, and that the vendor, a childless proprietor, was not competent to alienate, save for necessity, and that there was no necessity for the alienation in the present case. This is assuming that the issues were properly stated as they were by the first Court to the effect—

"Was Jamayat Singh competent, by custom, to sell his ancestral land without necessity?"

"And did he sell the land for lawful necessity?"

and that the matter was not complicated by the fact that the sale was to a relation, one of the heirs, as in the issue stated in the remand order of this Court.

The obvious result of the complication is to fix an issue on which it is certain almost that no evidence will be forthcoming. Its decision, then, depends on the adjustment of the burden of proof—whether it is just or equitable that a case of disputed alienation to a relation should be disposed of in this way is another question. It seems desirable, on the other hand, that issues, especially with regard to questions of custom, should be stated in the simplest form possible, so that the burden of proof may be properly adjusted, and that they may be easy of comprehension. In this case, I should say they might have been stated as the first Court stated them in the first two issues, and there might have been a further issue, if necessitated, by the pleadings: Whether in the case of the first two issues being found against the plaintiff, the fact that he was a relative, in accordance with custom, validated a sale that would otherwise be invalid. It is clear that, according to the ordinary rule, it was incumbent on the plaintiff to prove this special custom in his favour, the effect of which would be to remove the case beyond the sphere of the ordinary rule found against him. Taking this view of the matter, he failed to discharge the burden of proof, and, accordingly, the plaintiff was not entitled to possession, and his claim was properly dismissed by the first Court.

Punjab Record No. 59 of 1889 has been cited by the Divisional Judge in support of the view he took of the case. Assuming, however, that that case was correctly decided in upholding the alienation, it may be observed that it appears to be quite distinguishable from the present, inasmuch as the alienor was found by custom to possess an unrestricted power of alienation. The present case is also quite distinguishable from another class of cases, among which may be cited *Punjab Record* Nos. 18 and 19 of 1890, No. 116 of 1886, and No. 85 of 1889, in which the alienation in favour of relatives has been upheld as against other relatives, on the ground that it was justified by the necessity of making some remuneration to relatives who had rendered services to the alienors, who were old and infirm. The view taken as to the burden of proof is in accord with that taken in *Punjab Record* No. 8 of 1891, which discusses the question, and which is followed in a recent (unpublished) ruling, No. 400 of 1890, the alienation being set aside in both cases.

I would accordingly restore the decree of the first Court dismissing the claim, and order the plaintiff to pay costs throughout. It should be understood that this decree, refusing the plaintiff possession as purchaser, is no bar to his recovering possession of any share he may be entitled to as co-heir with the defendants. That claim has not been put forward, nor adjudicated on in the present suit.

29th Jany. 1892. RIVAZ, J.—I concur.

— — —
No. 54.

APPELLATE SIDE. { HIDAYAT ALI KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,
Versus
BASIT ALI KHAN,—(DEFENDANT,)—RESPONDENT.
Case No. 82 of 1890.
(BENTON & RIVAZ, JJ.)

Joint owners—Erection of building by one on common land—Absence of special damage to others.

The defendant, who was a proprietor in Gohana (Rohtak District), erected a pakka building upon a portion of the *abadi*—208 yards in extent—or common property of the village. The building was commenced within a very few months before suit, and was immediately objected to by at least one of the plaintiffs. It was completed in spite of the plaintiffs' protests and appeal to the Revenue authorities, at or about the date when the present suit was launched. The defendant spent Rs. 1,000 or thereabouts upon the building, which was adjacent to, if not built on to, his own house. No acquiescence on the plaintiffs' part was established.

The plaintiffs, sixteen proprietors of Gohana, sued to have the building demolished. They did not succeed in proving any substantial damage from the building, over and above the fact that defendant had probably monopolized a larger share of this particular portion of the common land than would fall to him at a division.

Held, that the plaintiffs' appeal must be dismissed upon the ground that, it not being satisfactorily established that any substantial mischief had accrued to the plaintiffs from the completed building erected at considerable expense, the lower Court had exercised a wise discretion in refusing to order its demolition.

Further appeal from the decree of A. W. Stogdon Esquire, Divisional Judge, Delhi, dated 8th November 1889.

Madan Gopal, for appellants.

Rattigan, for respondent.

The plaintiffs, sixteen members of the proprietary body of Gohana, a town or village in the Rohtak District, sued to obtain a decree for the demolition of a pakka building erected by the defendant, another proprietor, on the common land without their consent or acquiescence.

The facts sufficiently appear from the judgment of

RIVAZ, J.—This is a case in which sixteen members of the 15th Jany 1892. proprietary body of Gohana (Rohtak District) seek to obtain an order for the demolition of a building erected by defendant, who is also a proprietor in Gahana, upon certain land, 208 yards in extent which is a portion of the *abadi*, and, therefore, common to the whole village. The first Court decreed the claim, but the Divisional Judge of Delhi declined to uphold the decree and dismissed the suit.

As to the material facts, there is no important discrepancy in the findings of the two Courts. I consider it to be established that the property built upon is undivided common property: that the pakka building erected by the defendant was commenced within a very few months of the suit, and was immediately objected to by at least one of the plaintiffs: that it was completed in spite of plaintiffs' protests and appeal to the Revenue officers, at or about the date when the suit was launched: and that the defendant has spent something in excess of Rs. 1,000 upon the building, which is adjacent to, if not built on to, his own house. Certainly no sort of acquiescence on plaintiffs' part is established, and all that can be said under this head is, that if they had filed a suit in the Civil Court immediately, instead of applying to the Revenue authorities, who were eventually compelled to decline jurisdiction by reason of the land being situated within the *abadi* of the village, the actual erection of the building by defendant might have been stayed by means of a temporary injunction. I am also of opinion that the plaintiffs have not succeeded in proving any substantial damage accruing from the erection, over and above the fact that defendant has probably monopolized a larger share of this particular portion of the common land than would fall to him at a division. I think it also probable, though this point too is not quite clear from the record, that the plaintiffs, though numerically only a small proportion of the whole proprietary body, are fairly representative of the three *pattis* into which the town or village is said to be divided.

The gist of the Divisional Judge's decision is that, as a Court of Equity, he would not be justified in ordering the

removal of the building in the present case, unless and until plaintiffs proved some appreciable injury to themselves from the erection complained of.

The case was fully argued before us, and our attention was

Punjab Record No. 73 of 1882.
Punjab Record Nos. 74 and 121 of 1885.
Punjab Record No. 54 of 1888.
Punjab Record No. 187 of 1889.
 I. L. R., 9 All., 661.
 I. L. R., 12 All., 436.
 I. L. R., 8 Calc., 708.
 I. L. R., 14 Calc., 189—236 and the earlier cases therein collected.
 I. L. R., 2 Bom., 133.

see
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directed to the leading decisions both of this Court and the other High Courts bearing upon the question for decision. I have noted the references in the margin.

As far back as 1865, Sir Barnes Peacock, Chief Justice (*vide Lala Biswambhar Lal v. Rajaram*, 3 B. L. R., App., 67), refused, in a suit between joint owners, to order the demolition of a wall built upon the common land by one of the co-sharers, on the ground that there was no evidence to show that injury had been caused to the plaintiff by the erection, and therefore a Court of Equity should refuse its assistance for the purposes of having the wall pulled down. So, again, in *Nocury Lal v. Bindabun Chunder* (I. L. R., 8 Calc., 708) the Court observed: "There is a considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building, and a case in which, after a permanent building has been erected at considerable expense, he (i. e. one co-sharer) seeks to have that building removed. In a case such as that last mentioned, the principle which seems to have been settled by the decisions of this Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further, that he took reasonable steps in time to prevent the erection."

The whole question is again exhaustively considered in a later decision, *The Shamungger Jute Factory Company v. Ram Narain Chatterji* (I. L. R., 14 Calc., 189): "We are not aware," say the Court, "of any decision which establishes the broad proposition contended for by the plaintiffs, that one co-owner is entitled to an injunction restraining another co-owner

“from exceeding his rights, absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction.” And again, “the principle (in England) is well settled that, in granting or withholding an injunction, the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant.” I can find nothing which conflicts with the above view in any of the published decisions of the other High Courts though I could, if necessary, quote much in its support. Nor do I consider that the published rulings of our own Court lead collectively to any different result. The most recent case is No. 187, *Punjab Record* of 1889, and it appears to me that the judgment at page 662, paragraph 3 of the Report, distinctly approves and follows the leading principles enunciated in the extracts quoted above from the Calcutta decisions.

Following those principles, which as it appears to me have been fully appreciated and properly applied by the learned Divisional Judge, I would dismiss this appeal, upon the ground that, it not being satisfactorily established that any substantial mischief has accrued to plaintiffs from the completed building erected at considerable expense, the lower Court has exercised a wise discretion in refusing to order its demolition.

I would direct each party to pay his own costs throughout.

BENTON, J.—I concur with my learned colleague in holding *15th Jany. 1892.* that the plaintiffs are not entitled to an injunction for the demolition of the house, which the defendant has been allowed to build at considerable expense on a portion of the common land of the village about the town of Gohana. The question of the management of common land and the powers of the co-owners in dealing with it, is of much importance in this country in consequence of the large amount of property everywhere held in co-ownership. There are numerous decisions of the Courts dealing with the subject, and the conclusion arrived at appears to be in accordance with the principles which have been followed with general uniformity, having regard to the varying circumstances presented to them by this Court and by the High Courts. The land which the defendant has monopolized with his house was land of little value, not reserved for any common purpose. So far as appears the village pro-

prietors will not be in the slightest degree incommoded by the house that has been built. On the other hand, if demolition had been ordered, property to the value of Rupees 1,000 would be destroyed, and the defendant would suffer this loss.

I would not have it supposed that I regard the defendant's conduct in occupying this common land in breach of an express rule on the subject in the *Wajib-ul-arz*, and, in spite of the remonstrances of the co-owners, with other than extreme disfavour. I should regret if our refusal of the particular remedy prayed for were regarded as a denial of justice absolutely, or if it should give other co-owners of common property encouragement to take a similar course. I would only observe that the village proprietors are not concluded by this case from obtaining other redress for the encroachment on the common property, and there is every likelihood that they might have successfully prevented it by timely application to the Civil Court before any considerable expenditure was incurred.

The appeal is dismissed and each party will pay its own costs of this appeal.

Appeal dismissed.

No. 55.

APPELLATE SIDE: { BHAJAN LAL, —(JUDGMENT DEBTOR),—APPELLANT,
Versus
DELHI AND LONDON BANK, LIMITED,—
(DECREE-HOLDER),—RESPONDENT.
Case No. 1114 of 1891.
(ROE, J.)

Interest on decree—Principle of calculation.

Semle, the correct method of calculating interest on a decree is to take each payment made, calculate the amount of interest due on the decree up to the date of this payment: credit the payment of this interest: and carry the surplus of the payment to the credit of the principal, and strike a fresh balance.

First appeal from the decree of S. Clifford Esquire, District Judge, Delhi, dated 11th June 1891.

This was an appeal under Section 244, Civil Procedure Code, from a decree made in the execution department.

The sole question for decision was as to the principle upon which interest was to be calculated upon a decree bearing interest. The facts sufficiently appear from the judgment of the Court.

ROE, J.—There is no dispute about figures, but only about 9th Jany. 1892. the principle of calculating interest. The principle adopted by the District Judge is to take each payment made, calculate the amount of interest due on the decree up to the date of this payment, credit the payment to this interest, and carry the surplus of the payment to the credit of the principal, and strike a fresh balance. It is contended that this is to allow compound interest, and that the proper course is: (1) to calculate the total simple interest due up to the date of the last payment and add this to the decree, and, *per contra*, to credit the total payment made, with interest at six per cent. from their dates to the final date of payment; or (2) to credit the whole payment made on each occasion to the principal then due, leaving the interest due on that date to stand over. It is stated that the effect of adopting either of these two methods would be to reduce the amount now due by some Rs. 1,200, and it is urged that this is only fair, because if the judgment-debtor had made no payment till now, the decree-holder would only be entitled to recover what the judgment-debtor now admits to be due.

It appears that on each occasion of payment the amount then due for interest was less than the payment made: there was always surplus which was credited to the principal: there has, therefore, not in fact been any charging of compound interest.

Mr. Rattigan urges that the method adopted by the District Judge is not only a fair and proper one, but it is directly supported by the rulings in the cases reported in 6 M. Ind. App., 305-306; 8 B. L. R., 110-142; and 22 W. R., 525. Mr. Madan Gopal has no authorities against these rulings, or against Mr. Rattigan's contention; he merely urged that, for the reasons already stated, the principles contended for by him are the correct ones.

I think the principle adopted by the District Judge is both fair in itself and supported by authority. Had the payments on any occasion been less than the interest then due, and had the balance of the interest been added to the principal, and future interest charged on the total, this would have been

to allow compound interest, and would not have been in accordance with the terms of the decree. But as it is, the calculations of the District Judge cannot be said to be opposed to the decree, and this appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Full Bench.**No. 56.**

RAM KISHEN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

SAYAD BRAHIM SHAH,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1524 of 1890.

(ROE, BENTON & STODDON, JJ.)

Suit by mortgagee for possession—Suits Valuation Act, 1887—Value for purposes of jurisdiction.

A suit by a mortgagee seeking to recover possession of land under his mortgage is a suit falling within the rules made under the Suits Valuation Act, 1887, which provide that in suits for possession of land under clause 5, Section 7, Court Fees Act, 1870, the value of the suit for purposes of jurisdiction is thirty times the land-revenue.

The ruling in *Punjab Record*, No. 1 of 1887, that in a suit by a mortgagee for possession, the subject matter was not the land itself but the mortgagee's interest therein under the mortgage, must be deemed to be superseded by the passing of the Suits Valuation Act and the rules made thereunder.

Further appeal from the decree of Khan Muhammad Hayat Khan O.S.I., Divisional Judge, Mooltan, dated 5th December 1890.

Madan Gopal, for appellants.

Oertel, for respondent.

This was a reference to a Full Bench to consider the question of jurisdiction in suits by a mortgagee to recover possession of land under his mortgage. The question was fully dealt with in *Punjab Record*, No. 1 of 1887, but since this decision the Suits Valuation Act, 1887, has been passed.

The order of reference was as follows:—

STODDON, J. (BENTON, J., concurring).—In his plaint 10th March 1892. plaintiff prayed for joint possession as *likha mukhi* mortgagee of certain shares in wells and lands, valued at five times the land revenue at Rs. 147-5-1, and at thirty times the land revenue Rs. 883-14-6, and for Rs. 19-10-0 value of produce. He stated that a sum of Rs. 1,305-12-6 was due to him on the footing of the mortgage, on account of principal and interest. Both the Courts below concurred in dismissing his suit. He has appealed to this Court, valuing his appeal for purposes of jurisdiction at Rs. 1,305-12-6, but it is objected that as the suit

is one for the possession of land, its value cannot exceed Rs. 883-14-6, being thirty times the revenue payable on the land, plus Rs. 19-10-0, the value of produce. Rulings of this Court, published as *Punjab Record*, No. 1 of 1887, and *Punjab Record*, No. 1 of 1891, have been cited in support of the contention, that the sum alleged by plaintiff to be due on the footing of the mortgage, represents the value for purposes of jurisdiction, but they were passed in suits instituted before the rules for defining the value of land in suits for possession of land were framed. As we are disposed to think that the value of the suit cannot in any case exceed the value of the land, we refer the question of the value of this suit for the purposes of jurisdiction to a Full Bench for decision.

The following opinions were recorded by the learned Judges forming the Full Bench.—

13th April 1892. ROE, J.—The facts of the case and the point referred are sufficiently stated in the referring order.

In *Punjab Record*, No. 1 of 1887, it was pointed out that under the law, as it then stood, the value of the suit for purposes of jurisdiction depended on the value of the subject matter of the suit, and it was held that, in a suit for possession of land by a mortgagee under a mortgage, the subject matter was not the land itself, but the mortgagee's interest under the mortgage. It followed that the value must be the value of the interest and not that of the land.

But since that decision the Suits Valuation Act has been passed, and rules have been made under it by Government, which provide that in suits for possession of land under clause 5, Section 7 of the Court Fees Act, the value for purposes of jurisdiction is thirty times the land revenue.

I think, therefore, that the question now before us resolves itself into this, is the suit one falling under the section just quoted? I think that it is so, and I would reply that the value of the present suit for purposes of jurisdiction is thirty times the jama, or Rs. 883-14-6, plus Rs. 19-10-0 claimed for produce, in all Rs. 903-8-6.

13th April 1892. BENTON, J.—I concur in the judgment of Mr. Justice Roe and in the answer proposed to be returned to the reference. The Government might, if it had thought proper, in framing rules for the valuation of suits for possession of land, have been guided by reasoning similar to that adopted in the order of reference to the Full Bench in *Punjab Record*, No. 1 of 1887

and have assigned different values to different classes of suits, according to the interest in the land of different claimants. With two exceptions provided for in Rule VI, the Rules prescribe uniform values for all suits for possession under Section 7 (v) of the Courts Fees Act, whatever interest be claimed.

STODDON, J.—I concur.

13th April 1892.

On the appeal again coming before a Division Bench, the final judgment of the Court was delivered by

STODDON, J. (BULLOCK, J., concurring).—The Full Bench 14th June 1892. has ruled that the value of the suit is Rs. 903-8-6. As the Courts below concurred in dismissing it, a further appeal does not lie. Mr. Madan Gopal now informs us that his client applied on the 5th December to the Divisional Judge for a certificate, and that his application was refused; and he asks us to treat the petition of appeal as an application for revision under Section 40, sub-section 2 of the Punjab Courts Act. Even if we are competent to do this, we are not satisfied that any question of law or custom or general interest is involved. We, therefore, decline to entertain the petition of appeal as one for revision, and we dismiss the appeal with costs.

Appeal dismissed.

— — —
No. 57.

BANARSI DAS,—(PLAINTIFF),—

Versus

SAYAD SULTAN MIRZA AND OTHERS,—(DEFENDANTS).

} REFERENCE SIDE.

Case No. 7 of 1892.

(FRIZELLE & RIVAZ, JJ.)

Civil Procedure Code, 1882, Section 629—Review of review—Competency of.

The language of the last paragraph of Section 629, Civil Procedure Code, 1882, that "No application to review an order passed on review or on an application for a review shall be entertained" forbids any application for review of an order admitting or rejecting an application for review, or of the judgment arrived at after a re-hearing of the case under Section 630, whether that judgment affirms or varies the previous judgment, and though, in either case, it is followed by a new decree: in other words, a review of a review is not competent.

The word "order" in the clause referred to is, apparently, not used in a technical sense as opposed to a "decree," but as a comprehensive term to express the final adjudication of the Court after the application for review has been admitted, and the case re-heard, and includes both the judgment and the decree.

Case referred, under Section 617, Civil Procedure Code, 1882, for the decision of the Chief Court, by J. C. Brown Esquire, Divisional Judge, Delhi.

Madan Gopal, for defendants.

This was a reference made by the Divisional Judge, Delhi, under Section 617, Civil Procedure Code. The question, briefly stated, was whether under the existing Code of Civil Procedure a review of a review is competent. The facts sufficiently appear from the decision of the Chief Court which was delivered by—

15th June 1892. RIVAZ, J.—This is a reference under Section 617, Civil Procedure Code, by the late Divisional Judge of Delhi (Mr. J. C. Brown).

It appears that on the 31st August 1891, the then Divisional Judge of Delhi (Mr. Troward) affirmed on appeal the order of the Munsif, dismissing a certain suit brought by the plaintiff appellant. An application for review of the Divisional Judge's order was preferred by the plaintiff. The application was granted on the 13th January 1892, after notice to the opposite party, and, on the 4th February, Mr. Troward re-heard the appeal and maintained his previous decision. A new decree of the Appellate Court was drawn up upon the same date. After this, the plaintiff applied for a review of the order of the 4th February. Mr. Troward directed notice to issue to the opposite party, and the application then came on for hearing before Mr. Brown.

The real question referred is, whether a review of the order of the 4th February is prohibited by the last clause of Section 629, Civil Procedure Code. Mr. Brown is of opinion that it is not so prohibited, because the order passed on review on the 4th February amounts to a new decree. Two questions are therefore asked in the reference (1). Was the proceeding of this Court on 4th February 1892 tantamount to a decree? (2) If it was, does the word "order" in the last clause of Section 629, Civil Procedure Code, include decree? It will be observed that there is no question as to the jurisdiction of the Court to entertain a second application for review of the original decree of the 31st August 1891, a question similar to that dealt with by this Court in Civil Appeal No. 66 of 1887. The doubt is as to the power to review an order passed on review, when the review has been admitted, the case re-heard, and a new judgment and decree has followed. We may point out at once that the procedure adopted by the Divisional

Judge in having a new decree drawn up on the 4th February 1892, after the judgment of that date had been delivered re-affirming the earlier judgment, was in our opinion correct, and this is a sufficient answer to the first question asked upon the reference.

As to the true construction to be put upon the last clause of Section 629, Civil Procedure Code, we may remark that the section, as enacted in 1877, and as it now stands, was obviously drafted after consideration of, and with due advertence to, the decision of the Full Bench of the Calcutta High Court in *Nusser-ud-din Khan v. Indurnardin Choudhry* (5 W. R., 93). The question referred in that case was whether a review of an order passed on an application for review, or an admitted review, could be entertained under the Civil Procedure Code of 1859, which enacted, in Section 378, that an order "whether for rejecting the application or granting the review shall be final." Peacock, Chief Justice, held with the concurrence of a majority of the Full Bench (Seton-Karr, J. however, dissenting), (1) that an order rejecting an application for review was not absolutely final, and that, notwithstanding such rejection, it might still be open to a Court to admit a re-view upon another ground: (2) that when an application for review had been admitted, and the case re-heard, whether the judgment was altered on the re-hearing, or not altered, a review of the second judgment was not prohibited by the terms of the section. As already indicated, one of the Judges of the Full Bench expressed a contrary opinion upon both the above points. Obviously, therefore, when the new Code was enacted, it was desirable to settle both points beyond dispute. Section 629 of the present Code therefore enacts that "No application to review an order passed on review or on an application for review shall be entertained." This enactment appears to us to admit of a second application for review of judgment under certain circumstances as was held in Civil Appeal,* No. 66 of 1887, and the cases therein cited. But we

* In the Chief Court of the Punjab.

(BENTON AND RIVAZ JJ.)

SADULLA KHAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS.

Versus

FAUJDAR AND OTHERS,—(DEPENDANTS),—RESPONDENTS.

Petition for review of the order of Mr. Justice Burney, dated 13th

May 1888.

} APPELLATE SIDE.

RIVAZ, J (BENTON, J., concurring).—The material facts are as follows: 31st October 1889. on the 8th January 1887 the present applicant for review of judgment lodged an appeal in this Court from the order of the Subordinate

are of opinion that it plainly forbids any application for review of an order admitting or rejecting an application for review, or of the judgment arrived at after a re-hearing under Section 630, Civil Procedure Code, whether that judgment affirms or varies the previous judgment, and though, in either case, it is followed by a new decree. The use of the word "order" in the clause in question, which has puzzled the Divisional Judge, does not appear to us to indicate any such distinction as he attempts to draw between orders which have the force of decrees and those which have not, within the definition in Section 2 of the Code. The word is, we think, used, not in its technical sense as opposed to a "decree," but as a comprehensive term to express the final adjudication after the application for review has been admitted, and the case reheard, and includes both the judgment and the decree. The view that, under no circumstances can a "review of a review be allowed" is strongly supported, and, in fact, we might say concluded, by the decision of their Lordships of the Privy Council in *Muhammad Yusuf Khan v. Abdul Rahman Khan* (I. L. R., 16 Calc., 749). In that case, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a Subordinate Court, purporting to act under Section 622 of the Civil Procedure Code. This order was reviewed by Mr. Young's *locum tenens*

Judge, Gujrat, dated 3rd December 1886, dismissing his claim. This appeal was set down for hearing before Mr. Justice Burney on the 15th January 1887, and after the files had been called for and inspected, was rejected without notice being served upon the respondent, by order dated 22nd March 1887. A review of the last mentioned order was applied for by the appellant on the 9th June 1887, and after the files had been again called for and notice issued to the respondent, the said application for review was rejected on the 13th April 1888. After this, *viz.*, on the 27th June 1888, the appellant filed an application for permission to appeal to their Lordships of the Privy Council. This application was set down for hearing before Mr. Justice Burney, and it would appear from that learned Judge's order of the 5th July 1888, that at his suggestion the application for leave to appeal was withdrawn, and a second application for review of judgment was filed instead. It is with this last application that we now have to deal.

An order was passed by Mr. Justice Burney on the 5th July 1888, directing the application to be laid before a Bench, and the first question which we have to consider is, whether we can entertain the application with reference to the last clause of Section 629, Civil Procedure Code.

That clause provides that "No application to review an order passed "on review or on an application for review shall be entertained." Now we would observe that the application with which we are dealing is on the

(Mr. Tracy) during the former's absence, and the order passed by Mr. Young was discharged. An application to review Mr. Tracy's order was made to Mr. Young on his return to office, and he in his turn set aside his predecessor's order. The Privy Council cancelled the last mentioned order, remarking, "That application was incompetent as being a second application for review." No direct reference is made to the last clause of Section 629, Civil Procedure Code, but that provision must have been the one to which their Lordships' observation referred.

For the above reasons, we are of opinion that the order of the 4th February 1892 is not open to review, and that is our answer to the reference.

Reference returned.

face of it in direct contravention of the clause just quoted, inasmuch as it purports to be an application for a review of the order of the 13th April 1888 (the 13th May 1888 is mentioned in the application, but this is clearly, a clerical error for the 13th April, as there is no order of the 13th May), i.e., it purports to be an application for review of an order passed on review. But even treating the present application, as we are asked to treat it, as a second application for review of the order dated 22nd March 1887, i.e. of the original order dismissing the appeal, we are still of opinion that it is not maintainable. The second application is, as a matter of fact, a mere repetition of the first application. No new grounds are urged, every point raised being fully covered by the previous application. We think that the decision of this Court, No. 107, *Punjab Record*, 1883, correctly lays down the law on the subject, viz., that a second application for review is only admissible when some fresh ground is advanced in support of such application, which the applicant was not in a position to adduce in the former application. This view is further supported by the case reported in I. L. R., 15 Calc., 432, and is in no wise opposed to the recent decision of their Lordships of the Privy Council in I. L. R., 16 Calc., 749 (*Muhammad Yusuf Khan v. Abdul Rahman Khan*).

We are constrained, therefore, to hold that the present application for review is inadmissible, and we must reject it with costs.

Application refused

No. 58.

FAIZULLA AND OTHERS,—(PLAINTIFFS),—
APPELLANTS.

APPELLATE SIDE. {

Versus

ABDUL HAMID,—(DEFENDANT),—RESPONDENT.

Case No. 553 of 1889.

(BENTON & RIVAZ, JJ.)

Whole and half blood—Pagwand or Chundawand—Sheikhs of Mauza Saman, tahsil Attock.

Found, in a suit between the whole and the half blood, the parties to which were Sheikhs of Mauza Saman, tahsil Attock, Rawalpindi District, descended from a Hindu ancestor, who became a convert to Islam some six or seven generations back, that the custom of the family being found to be *pagwand*, the burden of proof that the whole blood excluded the half blood in succession to a deceased brother lay upon the defendant, the full brother of the deceased, and had not been discharged.

Punjab Record, No 4 of 1891, referred to.

First appeal from the decree of A. Meredith Esquire, District Judge, Rawalpindi, dated 6th February 1889.

P. C. Chatterji and Ishwar Das, for appellants.

K. P. Roy and A. L. Roy, for respondent.

This was a contest between the whole and the half blood. The parties were Sheikhs of Mauza Saman in the Attock tahsil of the Rawalpindi District, and were descended from a Hindu ancestor, who was converted to Islam some six or seven generations back.

The facts sufficiently appear from the judgment of the Chief Court which was delivered by—

23rd April 1892.

BENTON, J.—The subject of dispute is the estate of the late Abdul Majid, son of Mian Shah Nawaz Khan of Mauza Saman, tahsil Attock. The plaintiffs are three half brothers and the son of a half brother, all by the same mother, and the defendant is a full brother of the deceased who has taken possession and is now sued for possession of a four-fifth share. The plaintiffs' claim has been dismissed and they appeal to this Court.

The case is thus a contest between the whole and the half blood which we are able now to approach with the advantage of the Full Bench Ruling, *Punjab Record* No. 4 of 1891, determining on which side the burden of proof lies according as the succession is *chundawand* or *pagwand*. It is admitted by both sides that the succession in the family is *pagwand*, so that the

burden of proving that the whole blood excludes the half blood is on the defendant.

The District Judge in deciding the case considered the effect of the *Riwaj-i-am* prepared at the recent settlement, that of a record of custom called the *Ikrarnama Chakwar* for the *Ilaka* of *Chachh*, prepared at the preceding settlement, and the number of instances established on either side, which were nearly equal, being eleven for the plaintiffs as against ten for the defendant. He quotes from *Punjab Record*, No. 11 of 1889, page 20 the words: "A vast number of cases have been decided by this Court which have shown that the ordinary customary rule prevailing amongst Hindus as well as Muhammadans, but chiefly amongst the latter, favours the exclusion of the half by the whole blood." Under these circumstances, he thought it safer, he says, to decide the case in accordance with the custom recorded at the first settlement for the *Chachh Ilaka* which, as he puts it, lays down that half brothers do not succeed unless associated. The parties in this case were admittedly separated. We thus see that, whatever effect the opinion as to the burden of proof may have had on the Judge's mind (and looking to the undecided tone of his judgment, this may have been considerable), the view he took of the matter was opposed to that now pronounced to be correct by the Full Bench ruling as applied to the present case.

Accordingly, in this Court, the respondent held a much less advantageous position than he enjoyed in the Court below. The learned pleader who represented him, sensible of the fact that the burden of proof lay on him, made all possible preparation to meet the exigency by getting documents printed to explain and establish the instances on which he relied in support of his side of the question. The case was very ably and completely argued by him. Nevertheless, the conclusion we are compelled to arrive at is that the burden of proof which lay on the defendant has not been discharged, and that the usual rule in cases of *pagirand* succession must prevail, all the brothers succeeding alike.

The parties are undoubtedly *Sheikhs* by caste, as recorded in the settlement record and descended from a Hindu ancestor, who became a convert to Islam some six or seven generations back. In the record of custom prepared at the recent settlement no special reference is made to such persons, although the basis of the scheme according to which it has been compiled is altogether tribal. There are indications in the record

that the parties have recently made pretensions to be Koreshis a tribe for which special provisions are recorded. The record was compiled by taking answers from district notables of the different tribes, to the same questions, in parallel columns. The notables of the different tribes then generally signed at the foot of the columns devoted to them. Among those who signed in the column for Koreshis are the defendant and a relative named Abdul Ali, belonging to a different village. This fact does not make the parties Koreshis, nor can it be assumed that rules applicable to Koreshis are applicable to them, or that they alleged this when the record was prepared. The attestation simply amounts to this, that the rules set out, as applicable to Koreshis, were so, in the opinion of the signatories. We accordingly get from this record no information as to what rules are specially applicable to the parties, although we may obtain from it other useful information as to tribal custom.

The defendant relied then on the Ikrarnama Chakwar which, as its title indicates, is a record prepared not on a tribal but a territorial basis. The learned pleader for the defendant contended that, although the tribal element was neglected, the defect was of no great consequence, as the variation of custom depends much more on difference of locality than on difference of race. It is impossible to accept this view of the matter as at all a correct statement. Undoubtedly, customs vary according to the people we have to deal with and they also vary to some extent among the same race in different localities. We may refer to our best customary records as illustrating this. A record which neglects the influence of either factor must be regarded as defective and untrustworthy,—a record with territory alone for its basis pre-eminently so. It is obvious that the rules it lays down can only indicate the prevailing type. The nonconformist element may have been large, or it may have been altogether unimportant. We do not know what tribes prevail in the Chachh Ilaka, but the later record of custom prepared on a tribal basis shows twice as many tribes following a rule of custom with regard to the matter in dispute at variance with the rule given in the earlier record as the universal one. In the earlier record the rule is thus stated: "*Question*.—If one of two brothers "by the same mother between whom property has been divided "according to *pogwand* were to die sonless without leaving any "widow, who would get his share ?

“ *Answer*—If one of four sons of a person by two wives, *viz.*, two by each, were to die sonless without leaving any widow before the partition of the paternal estate, then at the time of the partition his share would be divided between the others according to *pagwand*. But if the four brothers separately held possession of their share by virtue of partition, then the share of the brother dying sonless would pass to his brother of full blood, and his other brothers of half blood by a different mother would get nothing.”

This probably means that there must first of all be in all cases an equal division according to the *pagwand* rule, and that after this the whole blood in any further succession or distribution must prevail.

In the later record the question stands: “If a man die without issue, leaving a brother of the full blood separated and a brother by a different mother associated, how will these two inherit?”

The answer given without details is, that association or disassociation is of no consequence, and that the Dhunds, Sahs, Khetwals, Dhanials, Ghebas, Jodhras, Pathans, Awans and Hindus allow the full blood to succeed, while Ghakkars, Khat-tars, Sayads, Mughals, Rajputs, Jaggains, Koreshis, Jats, Gujars and Malliyars place whole and half blood on the same footing.

The parties to this case then endeavour to support their respective sides of the question by giving lists of instances, the plaintiff from tribes mostly of their own way of thinking according to the later record and from any locality all over the district, while the defendant gives a similar list, but we may suppose from the Chachh Ilaka. If the argument for the defence with regard to locality being the all important consideration were sound, the defendant's case ought to be regarded as very well supported. So with regard to the plaintiff's case, if we had any assurance that all the tribes from whom instances have been taken follow the same rule as the parties' tribe, and if the plaintiffs had taken the trouble to substantiate their instances, we might say the same of their case. We have, however, pronounced the territorial basis for a record of custom altogether insufficient. We should have to say so in regard to any part of the Province, but the fact is all the more obvious when we are dealing with a part of it, *viz.*, the North West Frontier where tribal influences predominate. So, in like manner, we have no assurance that the plaintiffs postulate that all the tribes from

whom they have selected instances follow the same rules as their tribe. The plaintiffs' list contains only one case relating to their own tribe, while the defendant's includes this case and two others. All the other instances in both lists must be pronounced irrelevant; the case common to both in all probability supports neither side as the learned pleader for the defendant was prepared to admit. It comes then to this, that the defendant who has to prove his case must rely on an obviously inadequate and incorrect record of custom, and two cases to which in all probability this record has given rise. As we have already said, we are compelled to the conclusion that he has failed to prove his case.

We therefore accept the appeal, and decree the plaintiffs' claim with costs in both Courts.

Appeal allowed.

— — —
No. 59.

HANS RAJ AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

Versus

JHANDA MAL,—(PLAINTIFF),— }
DWARKA DAS,—(DEFENDANT),— } RESPONDENTS.

Case No. 1516 of 1890.

(RGE & STOGDON, JJ.)

Striking out defence of defendant—Circumstances justifying such an order—Jurisdiction of Court of Political Agent, Bhopal—Jurisdiction of British Court to make decree affecting immoveable property out of British India.

In a suit for partition and possession of a one-third share of property, moveable and immoveable, including cash and choses in action, the Court of first instance, being of opinion that issues could not be properly settled until defendants 1, 2 and 3 produced their books, which the Political Agent of Bhopal reported could not be spared, directed defendant 1 to file a written statement setting forth in detail the entire joint property, moveable and immoveable, and in the case of trading firms, a balance sheet for each showing how they stood on the date of suit.

Defendant 1 failed to comply with this order, although the suit was adjourned from time to time to enable him to do so; and eventually the Court struck the three defendants' defence off the record and directed the plaintiff to produce *ex parte* proof against them.

Plaintiff produced evidence accordingly and the Court gave him a decree for—

- (a) Possession by partition of one-third share of the immoveable property in the Karnal District, and of the immoveable property situate at Sehore (Bhopal State) ;
- (b) Certain cash and outstandings ; and
- (c) Rupees 1,95,487-9-5 to be paid by defendants 1, 2 and 3.

Held, that the order striking the defence off the record was not justified by law and that the suit must be remanded

The statement required by the Court was not one of the nature prescribed by Section 114, Civil Procedure Code, which is as much as possible to be confined to a simple narrative of the facts, which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove. Here, the defendants had put in their defence and the Court did not wish them to supplement it in any way by a further statement of facts which they might believe to be material to their case. Section 113, Civil Procedure Code, therefore did not justify the order.

Nor was the order justified by Section 136, Civil Procedure Code. The document called for by the Court was neither in the possession nor in the power of the defendants and was not even in existence. Section 130 refers to documents which are *in esse* and not to documents which the Court desires to be brought into existence. Further, there is no power conferred by Section 136 or elsewhere to strike out the defence of a defendant of its own motion, and in the absence of an application to that effect by the plaintiff (*cf. Punjab Record*, No. 80 of 1889).

Observations as to the power of the Court to punish defendants for contumacious behaviour and to ensure the speedy disposal of suits.

Held, also, that the Court of the Political Agent, Bhopal, whatever its jurisdiction may be, was not one of the nature referred to in Section 12, Civil Procedure Code, not being established by the authority of the Governor-General in Council and Bhopal not forming part of British India.

Quære.—Whether the District Judge, Delhi, had jurisdiction with regard to the immoveable property situate and businesses conducted in foreign territory.

First appeal from the decree of S. Clifford Esquire, District Judge, Delhi, dated 7th August 1890.

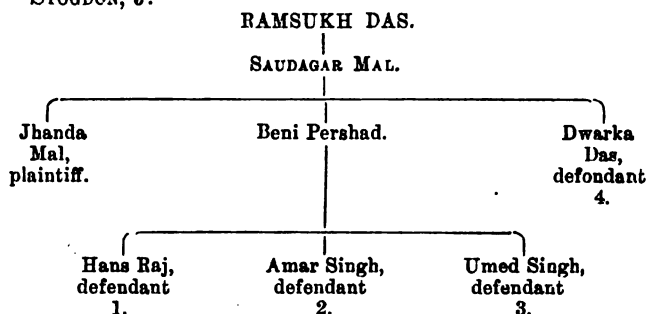
Gouldsbury and Madan Gopal, for appellants.

Rattigan, for respondents.

This was a first appeal from a decree of the District Judge, Delhi, in a suit which had been transferred to his Court for trial from that of the District Judge, Karnal.

The suit was for partition and possession of moveable and immoveable property, situate partly within and partly without British India. The facts and questions for decision sufficiently appear from the judgment of the Chief Court which was delivered by

23rd April 1892. STODDON, J.



In his plaint, plaintiff alleged that the parties were members of a joint Hindu family originally domiciled at Pundri in the Kaithal tahsil of the Karnal District, and carrying on business under various styles and titles at Pundri, Sehore Cantonment, near Bhopal, said in the plaint to be in British territory, and at Berasia and Bhopal in the Bhopal State, and Biawara in the Rajgarh State. He sued defendants for partition and possession of his third share of the property, both moveable and immoveable, which he valued at Rs. 2,15,931-3-10, after giving credit for a sum of Rs. 59,315-8-9, which he admitted having received.

His prayer was—

- (a) for partition and possession of his third share in the joint assets, including cash and outstandings;
- (b) for partition and possession of his share in the joint moveable and immoveable property;
- (c) for any other relief the Court might consider to be proper.

Dwarka Das did not contest the claim. On the contrary, he stated that he wished for partition himself, and that he had in July 1886 instituted a suit in the Court of the Political Agent at Sehore for partition of the whole of the property, with the exception of that situated at Pundri which he did not consider to be within the jurisdiction of the Political Agent.

Defendants 1, 2 and 3 pleaded—

- (1). That the claim was barred by Section 12, Civil Procedure Code, in consequence of the previously instituted suit in the Court of the Political Agent for Bhopal at Sehore.

- (2). That the suit was barred, because the parties had submitted the matters in dispute between them to arbitration, both before the institution of the suit in the Court of the Political Agent and during its pendency.

They stated that they had no objection to accounts being gone into, but contended that credit should first be given to them for a sum of Rs. 84,396 which arbitrators had held was due to their father by the joint firm.

The District Judge of Delhi, to whose Court the case was transferred from that of the District Judge of Karnal, was of opinion that issues could not be properly settled until defendants 1 to 3 produced their books, but the Political Agent at Bhopal reported that they could not be spared, so on the 11th February 1890, he directed defendant 1, Hans Raj, to file a written statement setting forth in detail the entire joint property, moveable and immoveable, and, in the case of trading firms, a balance sheet as to each, showing how they stood on 31st August 1888, when the present suit was instituted. Defendant 1 failed to comply with this order, although the case was adjourned from time to time to enable him to do so. Eventually, on the 25th June 1890, the District Judge struck defendants' defence off the record, and directed plaintiff to produce *ex parte* proof against them. This he did on the 7th August 1890: the District Judge gave him a decree (a) for possession by partition of one-third share of the immoveable property in the Karnal District, valued at Rs. 40,100, and of the immoveable property at Sehere, valued at Rs. 46,875; (b) for the Bardana cash and outstandings of the Pundri firm; and (c) for Rs. 1,75,487-9-5 to be paid by defendants 1 to 3. On the 1st October 1890, defendants 1 to 3 applied to the District Judge to set aside his decree which they styled an *ex parte* one. The District Judge rejected their application on the 6th October 1890, and they appealed from his order to this Court. Mr. Justice Benton held that Section 108, Civil Procedure Code, had no application to the case, and that no appeal lay. He therefore dismissed the appeal on the 15th December 1890, and on the same date defendants 1 to 3 presented a regular appeal to this Court from the decree of the 7th August 1890. It has been objected that their appeal is out of time, but we consider that they had sufficient cause for not presenting it within the prescribed period.

The first question for decision is whether the order of the District Judge striking the defence off the record was a legal one. It was struck off because Hans Raj had failed to comply with the order of the 11th February 1890, directing him to file a written statement.

The learned counsel for respondents contends that the order is justified by Section 113, Civil Procedure Code, which prescribes that, if any party from whom a written statement is required under the provisions of Section 112, fails to present the same within the time fixed by the Court, the Court may pass a decree against him or make such order in relation to the suit as it thinks fit. It is very doubtful, however, whether a written statement of the nature required by the District Judge can be considered to be a written statement of the nature referred to in Section 112, the frame of which is prescribed in Section 114; such written statements are as much as possible to be confined to a simple narrative of the facts, which the party by whom or on whose behalf the written statement is made, believes to be material to the case, and which he either admits or believes he will be able to prove; they are to be divided into paragraphs, and each paragraph is to contain as nearly as may be a separate allegation.

The statement required by the District Judge was not a statement of the above nature. Defendants had put in their defence, and he did not wish them to supplement it in any way by a further statement of facts which they might believe to be material to their case. He considered that issues could not be framed unless defendants produced their books, but as the Political Agent of Bhopal refused to give them up, he directed Hans Raj to examine them and to prepare balance sheets of the various firms. Such balance sheets were not a portion of defendants' pleas and cannot be considered as falling within the category of written statements referred to in Chapter VIII, Civil Procedure Code. If the information required by the District Judge was necessary in order to enable him to frame issues he could probably have obtained it by the issue of a commission to some respectable trader at Sehore to examine the accounts.

Section 136, Civil Procedure Code, is also relied upon by the learned counsel. It provides that if any party fails to comply with any order under Chapter X for discovery, production or inspection, which has been duly served, he shall, if a defendant, be liable to have his defence struck out. The question

therefore, is whether defendants failed to comply with any such order. It is urged that the statement required from them by the Court was a document of the nature referred to in Section 130, but it is clear that it was neither in their possession nor their power, and that it was not even in existence. The section in question clearly refers to documents already in existence and not to documents which the Court desires to be brought into existence. Moreover, this Court has held in a judgment published as *Punjab Record*, No. 80 of 1889, that there is no power conferred on a Court by Section 136, Civil Procedure Code, or elsewhere, to strike out the defence of a defendant of its own motion, if the defendant fails to comply with an order made under Section 130, and in the present case the plaintiff did not apply to the Court for an order under Section 136, Civil Procedure Code.

It may be objected that the Court surely must have some power to punish defendants for contumacious behaviour and to ensure the speedy disposal of the case. The Courts are, as a matter of fact, armed with ample powers, and if defendants had been in possession of the books and had contumaciously refused to produce them, their defence could certainly have been struck out under the provisions of Section 136, Civil Procedure Code. The present case is, however, one of a very exceptional nature. It is not clear that the District Judge was entitled to impose any penalties on defendants for the neglect of one of them to obey his order. He certainly was not entitled to strike out those portions of the defence, such as pleas of want of jurisdiction, and reference to arbitration, which had nothing whatever to do with the accounts and could be decided without reference to them.

If he could not obtain the information he desired from defendants, he would probably have been justified in framing general issues regarding the accounts and in deciding them on plaintiff's evidence in default of the production of any by defendants, or he might have issued a commission for the examination of the accounts, but his order striking out the whole of the defence was neither warranted by law nor by the circumstances of the case, and it must be set aside. It follows from this finding that the case must be remanded to the lower Court for decision on the merits, but we think it necessary to make a few remarks on the question of jurisdiction, and the powers of the Political Agent at Bhopal. It appears that previously to the institution of this suit, Dwarka Das, defendant

4, had sued Jhanda Mal, plaintiff, and Beni Pershad, father of defendants 1, 2 and 3, in the Court of the Political Agent at Sehore for partition of his third share in the immoveable property at Sehore and in the business carried on at Sehore, Birasia and Biawara.

Defendants pleaded before the District Judge of Delhi that Section 12, Civil Procedure Code, barred him from trying the present suit. He however came to the conclusion that the Political Agent had no jurisdiction. His finding is contested before us on appeal. Whether the Political Agent had or had not jurisdiction is a doubtful question. There is no doubt whatever that his Court has exercised the jurisdiction of a District Judge for a very long period, and has tried cases of large value in which British subjects were concerned, but his Court, whatever its jurisdiction may be, is not one of the nature referred to in Section 12, Civil Procedure Code. It is not a Court in British India. Sehore is not in British India, as has been erroneously assumed throughout the case. It is in the Bhopal State and is the head-quarters of the Bhopal Battalion. There are no grounds whatever for thinking that it is in British India, and it appears from Aitchison's Treaties (volume III, page 365) that in 1863 the Begam of Bhopal appealed against the exercise of jurisdiction by the Political Agent as a violation of the ninth Article of the Bhopal Treaty of 1818, but her appeal was disallowed. It probably had reference to criminal cases, but the question involved is the same, and it is clear that she could have had no ground for objection had Sehore been in British India. Neither is the Court one beyond the limits of British India established by the Governor-General in Council. It is clear from documents on the record and from a demi-official letter from the Secretary to the Government of India in the Legislative Department, which we have placed on the record, that nobody knows or can ascertain how the Political Agent's jurisdiction came into existence. It was probably the unauthorized and informal creation of some Agent to the Governor-General for Central India in the dim past. One thing seems to be clear, *viz.*, that it was not established by the Governor-General in Council. Under such circumstances, Section 12, Civil Procedure Code, does not bar the suit, but it may still be questionable whether the District Judge of Delhi has jurisdiction with regard to the immoveable property situated, and businesses conducted in, foreign territory. The point has not been argued before us,

and we have not therefore thought it proper to decide it; but it is difficult to see what power the lower Court can have to partition immoveable property situated in the Bhopal State, and, with regard to the businesses, questions of jurisdiction may arise under Section 17, Civil Procedure Code, which should be carefully considered. Whatever the origin of the Court of the Political Agent may be, it has been exercising unquestioned jurisdiction for many years, and it appears to be the only Court in which the whole of the dispute regarding both immoveable and moveable property situated in Bhopal territory can be decided, and its jurisdiction should not be lightly interfered with or treated with contempt. The Court has long been recognized as one having the authority of a Court established by the Governor-General in Council, and though the letter of the law may not bar the jurisdiction of the lower Court, its spirit certainly does bar it. Of course in a matter of this kind, the only question is whether the District Judge has or has not jurisdiction. If he has jurisdiction, plaintiff can claim to have the case tried by him, but the question is one which requires careful consideration.

We accept the appeal and set aside the proceedings of the lower Court and remand the case to it for decision on the merits after due consideration of defendants' defence. Certificate of refund of Court fees paid on the petition of appeal to be granted. Other costs to be costs in the cause.

Appeal allowed : cause remanded.

No. 60.

KANWAR HIRA SINGH,—(PLAINTIFF),—APPELLANT,

Versus

**DAVID PARKES MASSON AND 15 OTHERS,
(DEFENDANTS),—RESPONDENTS.**

} APPELLATE SIDE.

Case No. 284 of 1891.

(ROE AND FRIZELLE, JJ.)

Civil Procedure Code, 1882, Section 295—Priority—Rateable distribution among rival decree-holders.

Property which a Court has accepted as security for a decree is not liable to attachment by, and to be divided rateably among, rival decree-holders. To hold otherwise would be to render the provisions of the law for stay of execution on giving security illusory; and it is immaterial whether the property in question is offered as security by the judgment

debtor himself, or by a third party. If the property is liable to attachment and distribution under Section 295, Civil Procedure Code, in satisfaction of decrees against the judgment-debtor, it would be similarly liable when there were decrees against the surety as a third party.

It is the property, not the person offering it, which the Court accepts as security, and the acceptance thereof by the Court creates a charge on the property, by whomsoever offered, which must take precedence of all subsequent attachments or charges.

First appeal from the decree of R. L. Harris Esquire, Divisional Judge, Delhi, dated 6th December 1890.

Rattigan and P. C. Chatterjee, for appellant.

Turner, Clarence Kirkpatrick and Madan Gopal, for respondents.

This case raised the question as to the true construction of Section 295, Civil Procedure Code, 1882, in connection with the attachment of property deposited as security in execution of decree and the distribution of the sale proceeds thereof among rival decree-holders.

The facts sufficiently appear from the judgment of the Court which was delivered by

20th April 1892. ROZ, J.—The facts on which the present suit is based are briefly these. The plaintiff, Kanwar Hira Singh, obtained a decree against Kirpa Dial, Prabhu Dial, in the Court of the District Judge, Simla, for Rs. 30,427-1-0. The decree was transferred to the District Judge, Delhi, and sent by him to the Court of Mr. Watson, a Munsif, first class. On 16th April 1886, plaintiff, decree-holder, applied for execution in the usual way, and on the same day the judgment-debtor applied for temporary stay of execution to enable him to apply to the Chief Court for an order of stay of execution pending the decision of his appeal against the decree. An order was endorsed on this that execution would be stayed temporarily on proper security being furnished; this was followed by a further order on 19th April, which began by setting forth that the judgment debtor had been unable to arrange for security, and ordered a warrant of attachment to be issued for the 29th idem, but ended by stating that Sri Ram had become security and had deposited Rs. 28,700, and had promised to pay the balance (Rs. 1,727-1-0) into Court on 26th April. This he did, and on 26th April execution was stayed till 13th May.

The appeal by the judgment-debtor against the order of the District Judge, Simla, refusing to set aside the *ex parte*

decree, was rejected by the Chief Court on 6th May, and on 12th May Sri Ram gave a petition asking for a return of the money deposited by him. On 13th May, the decree-holder petitioned the Court that the surety might be summoned, and directed to call on the judgment-debtor to pay the amount of the decree, and, if he failed to do so, that the money deposited in Court might be made over to the decree-holder.

On 14th May, the judgment-debtor filed an appeal in the Chief Court against the *ex parte* decree of the District Judge, Simla, on the merits, and on 4th June an order was passed for stay of execution pending the appeal, on the understanding that the whole amount of the decree is paid into Court.

On 14th June 1886, the executing Court ordered that the money deposited should neither be returned to the surety nor made over to the decree-holder, but should be retained in the custody of the Court pending the result of the appeal to the Chief Court, unless the judgment-debtor meantime himself paid the amount of the decree into Court, in which case the deposit should be returned to the surety.

The money accordingly remained in deposit till after the decision of the appeal on 5th November 1887. Some further orders, as between the decree-holder, the judgment-debtor and the surety, were passed on 31st January 1887 by Mr. Watson, and an appeal was made from them, which was decided by the judgment published as No. 99 of 1887, *Punjab Record*, which, however, does not affect the present case.

On 13th October 1886, Ganeshi Lal and Kashi Nath (present respondents Nos. 5 and 6), who had obtained a decree against the judgment-debtor Kirpa Dial, Prabhu Dial, applied for the attachment of the Rs. 30,000 deposited in Court, describing it as the property of the judgment-debtor. The application was refused on 31st October, on the ground that no money realized from the judgment-debtor was in the hands of the Court. On 2nd November they presented a second petition, alleging that although the Rs. 30,000 was nominally deposited by Sri Ram, it was really the property of the judgment-debtor. Mr. Watson, on 22nd November, repeated his former order that there were no monies of the judgment-debtor in hand, from which rateable distribution could be made, and rejected the application.

The defendants Nos. 1 to 4 had instituted a suit in the Court of the District Judge, (Delhi) Mr. Clifford), against Kirpa

Dial, Prabhu Dial, and they applied, before judgment, for the attachment of the Rs. 30,000 deposited in the Court of Mr. Watson. An order of attachment was issued by Mr. Clifford accordingly, which Mr. Watson returned with an endorsement, dated 30th November 1886, that no money had been deposited by Kirpa Dial, Prabhu Dial. Mr. Clifford, on 2nd December, therefore issued a slightly modified order for the attachment of the money deposited *as security*. Mr. Watson replied on 7th December, explaining the circumstances under which the money had been deposited, and asking for further orders. Mr. Clifford replied that he could pass no orders *ex parte*; if any one objected to the order of attachment and claimed the money as his, he must object in the usual way. Accordingly, Kanwar Hira Singh, decree-holder, filed an objection on 10th December, and on 21st December Mr. Clifford passed an order, after hearing Mr. Cyril Kirkpatrick for the attaching creditors, to the effect that the attachment ordered on their application should take effect only if for some reason the attachment made at the instance of Kanwar Hira Singh were removed. "Kanwar Hira Singh is considered to have a superior right."

After the decision of the appeal by the Chief Court on 5th November 1887, the decree-holder applied to Mr. Watson that the money deposited might be made over to him, and the promissory and stock notes sold, and the proceeds credited to his decree. This was accordingly done by Mr. Watson's order of 21st December 1887. On the same date Mr. Masson, &c. (present defendants Nos. 1 to 4) who had obtained their decree, applied to the District Judge, Mr. Clifford, for the sale of the same notes, and Mr. Clifford passed an order calling for the files in Kanwar Hira Singh's case from Mr. Watson's Court and transferring the case to his Court. The details of Mr. Watson's and Mr. Clifford's proceedings are fully set forth in the judgment and in the printed record. Mr. Clifford held that there had been no proper sale on 21st December 1887; he also held that the notes deposited in Court were assets liable to a rateable distribution under Section 295, Civil Procedure Code. He accordingly ordered a re-sale of the notes and distributed the amount realized (Rs. 25,670-15-6) in the manner shown at page 16 of the printed record.

It is to recover from the different defendants the amounts thus paid to them that the present suit has been instituted

The Divisional Judge who tried the case (Mr. R. L. Harris), in our opinion, rightly overruled the objection that the defendants could not be sued in a single suit. But he held (1) that the money deposited in Court by Sri Ram was in fact the property of the judgment-debtor; (2) that the money realized by the sale of the notes were assets realized in execution of the decree within the meaning of Section 295, Civil Procedure Code, and liable to rateable distribution; (3) that Mr. Clifford had jurisdiction to transfer the execution proceedings from Mr. Watson's to his own Court; (4) that he passed his order of transfer before there had been any complete sale of the notes by Mr. Watson; (5) that the persons to whom the distribution was made under Section 295, Civil Procedure Code, had duly applied for execution of their decrees, and that the distribution was properly made to them. He therefore dismissed the plaintiff's suit. Plaintiff on appeal challenges all the findings which are against him, and urges that even if Mr. Clifford's proceedings were regular, and the money realized by the sale of the notes was liable to rateable distribution under Section 295, Civil Procedure Code, the plaintiff had a first charge on the amount realized under the provision to that section.

We also make a note that Mr. Kirkpatrick, counsel for respondents Nos. 7 and 8, also contends that Mr. Watson, whose jurisdiction as a Munsif, first class, was limited to Rs. 1,000, had no power to execute a decree for a sum in excess of that amount. He admits that this view is opposed to the published Full Bench decision* of this Court, and we have not thought it necessary to hear him at length on the point. We merely note his contention in case the matter is carried further.

All the other points have been argued at length before us, but we do not think it necessary to discuss or decide them all. For it appears to us clear that, assuming that the notes paid into Court were the property of the judgment-debtor, Kirpa Dial, Prabhu Dial, and not of the surety, Sri Ram, from the moment they were accepted by the Court as security for the decree of the present plaintiff, and execution of that decree was consequently stayed, the amount of that decree became at any rate a first charge on them, and even if the amount realized by the sale of the notes were to be considered assets realized under Section 295, Civil Procedure Code, plaintiff would still be entitled under that section to receive his decree in full before other decree-holders could take a share.

* *Punjab Record* No. 31 of 1887.

It appears to us that to hold otherwise, and to say that property which a Court has accepted as security for a decree is liable to distribution under Section 295 without reference to the fact that it has been accepted as security, would be to render the provisions of the law for stay of execution on security illusory. We cannot see that it makes any difference whether the property is offered as security by the judgment-debtor himself, or by a third party. If it is liable to attachment and distribution under Section 295, Civil Procedure Code, in satisfaction of decrees against the judgment-debtor, it would be similarly liable when there were decrees against the surety when he was a third party. It is the property, not the person offering it which the Court accepts as security, and we think that the acceptance by the Court creates a charge on the property, by whomsoever offered, which must take precedence of all subsequent charges.

It follows from this that the plaintiff is entitled to a decree against all the defendants, except those against whom he has abandoned his appeal, for the amount they actually received under Mr. Clifford's order as shown at page 16 of the printed record. We do not think interest should be added up to date, but we direct that the amount decreed against the separate groups of defendants bear interest at the rate of six per cent. per annum from the date of the present decree till realization, and that each group of defendants pay plaintiffs' costs in both Courts calculated on the amount of their respective decrees.

Appeal allowed.

No. 61.

**ASA SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,**

Versus

**HARI SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.**

Case No. 1466 of 1890.

(ROE & FRIZELLE, JJ.)

APPELLATE SIDE. {

Custom—Alienation—Childless proprietor—Goraya Jats, tahsil Ajnala, Amritsar District.

Found, in a suit the parties to which were Goraya Jats of tahsil Ajnala, Amritsar District, that a mortgage—which was held to be in fact a purely colourable transaction—by a childless proprietor in favour of a

nephew in the presence of other near collaterals was not authorized by custom.

The onus of establishing the validity of the alienation was upon those setting it up, within the general principles explained in *Punjab Record*, No. 107 of 1887.

Further appeal from the decree of Colonel C. H. T. Marshall, Additional Divisional Judge, Amritsar, dated 30th October 1890.

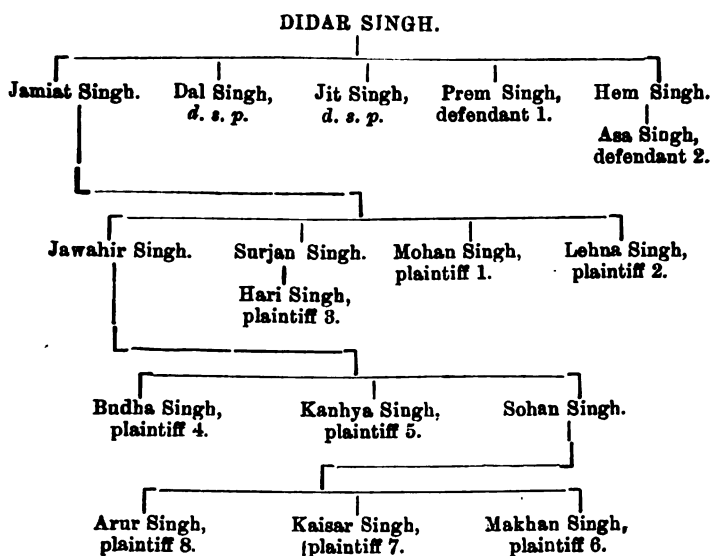
Oertel, for respondents.

This was a suit to contest an alienation—a mortgage which was held to be in fact a purely colourable transaction—by a childless proprietor in favour of a nephew in the presence of other near collaterals.

The parties were Goraya Jats of tahsil Ajnala, Amritsar District.

The facts sufficiently appear from the judgment of the Court which was delivered by

ROE, J.—The parties who are Goraya Jats of the Ajnala tahsil, Amritsar, are thus related—



Defendant 1 by a registered deed, dated 26th February 1889, mortgaged his whole property to defendant 2 for Rs. 1,500. Plaintiffs sue for a declaration that the mortgage does not affect their interests as reversioners.

We have no hesitation in concurring with the lower Courts in finding that the mortgage was entirely without necessity, and was in fact a purely colourable transaction.

Plaintiffs are, therefore, entitled to the decree given them by the Divisional Judge, unless it can be shown that defendant 1 had the power to make an alienation in favour of defendant 2 without necessity.

The ground on which the first Court has held that he had, is that as the alienation is in favour of a near male collateral, the onus of proving that there was no power of alienation rested, according to reported decisions of this Court, on the objectors.

We do not think the cases quoted were intended to interfere with the general principles laid down in *Punjab Record*, No. 107 of 1887. No doubt they hold rightly that, where the alienation is in favour of a near male collateral, the general presumption against its validity is much weakened, if not destroyed. But in these cases the particular circumstances of each case, and the special evidence as to custom, must be fully considered, and the decision must be regarded as one applicable to the special case rather than as one dealing with a general question of onus.

In the present case the *Wajib-ul-arz* of 1853 stated that no instances of alienation had hitherto occurred; but a proprietor might sell or mortgage his land for personal necessity (*zati zarurat*), or to pay Government revenue.

In the *Riwaj-i-am* of the second settlement, the general custom is distinctly stated to be, that a proprietor cannot give his property to one heir to the exclusion of another, or alter the proper shares of his heirs.

Under the head of exceptions, it is recorded that the proprietors of the Ajnala tahsil say that a proprietor may make a gift for religious purposes (*sankalap* or *khairat*) to the extent of one-twentieth of his property; and that a sonless proprietor may make a gift, first to his *agruba karibtar*, then to more distant *agruba*. If amongst the *agruba* there is no one to render him service, then he may make a written gift in the presence of the brotherhood to a *yak-jaddi*, who will render him service.

No examples are given in support of this exception, and we think it very doubtful if, accepting it as a true declaration of custom, it can be held to support an alienation like the present. Taken as a whole, the entry clearly refers not to sales or mortgages, but to gifts, the circumstances of making which are the same as those of making an adoption or appointment of

heir. If it could be shown that Asa Singh had for any length of time lived with Prem Singh as his son, and rendered him service, and had Prem Singh transferred his land to him as a recognition of such service, the transfer might very possibly have been valid. But under the circumstances of the present case, the mortgage to Asa Singh cannot possibly be considered a transfer of this nature.

It appears that in 1882, Prem Singh made a mortgage of Rs. 500 in favour of Hari Singh, present plaintiff 3. It was contested in a suit by all the other collaterals *including Asa Singh*, on the ground that by custom Prem Singh had no power to make the alienation. The Court held, without any real inquiry into custom, that the plaintiffs had failed to make out their case. There was, foolishly, no appeal.

We think that the custom of the parties' tribe does not allow the present alienation, and we confirm the decree given to plaintiffs by the Divisional Judge. But we direct that the parties pay their own costs throughout, for the mortgage to Asa Singh was clearly the result of plaintiffs' own act in allowing the mortgage to Hari Singh to pass without an appeal, and the plaintiff, Hari Singh, is still benefitting by that mortgage.

Appeal dismissed.

No. 62.

NATHU,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMATS IDO AND MIRAN,—(PLAINTIFFS),
RESPONDENTS.

} APPELLATE SIDE

Case No. 154 of 1891.

(BENTON & RIVAZ, JJ.)

Custom—Succession—Prostitutes of Lahore—Muhammadan law.

Found, in a suit, the parties to which were professed prostitutes residing at Lahore, that no special custom was proved regulating the succession to the property of a collateral, and that, therefore, Muhammadan law must be applied.

*Further appeal from the decree of Colonel O. H. T. Marshall,
Divisional Judge, Lahore, dated 30th December 1890.*

K. P. Roy, for appellant.

P. C. Chatterjee, for respondents.

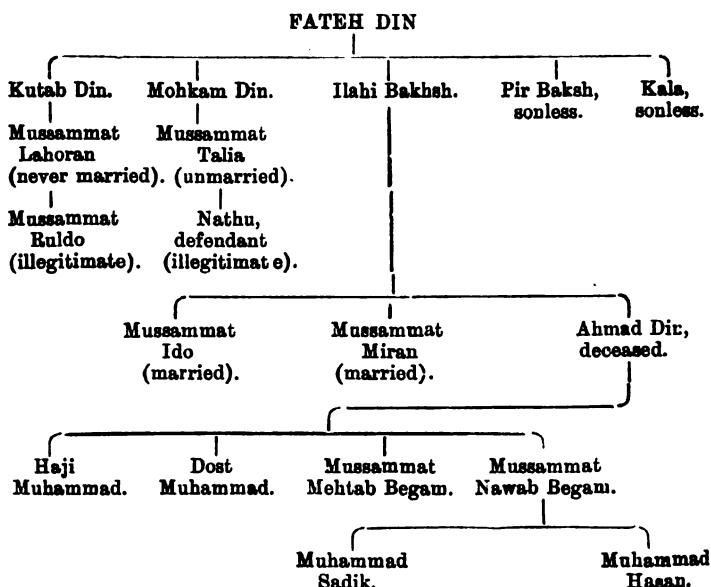
The principal question for consideration in this case was as to the law—custom or Muhammadan law—applicable to a case of succession to the immoveable property of a collateral.

The parties were professed prostitutes residing in Lahore.

The judgment of the Chief Court, which sufficiently sets out the facts, was delivered by

2nd May 1892.

BENTON, J.—The plaintiffs, Mussammats Ido and Miran, sued Nathu and others to recover possession of a portion of a house belonging to the estate of the late Mussammat Ruldo, situated in Lahore. The rest of the house is in their possession, or of that of a tenant who recognises their right. The relationship of the parties appears from the following pedigree table :



The claim is made in accordance with Muhammadan law, the learned pleader for the respondent plaintiffs explaining that, in accordance with that law, the illegitimacy of the deceased is no barrier to inheritance from her through her mother, while, in the same way, the defendant's illegitimacy must be admitted to be no barrier to his succession through his own mother and through Mussammat Ruldo's mother; also, that, the plaintiffs are heirs, as taking through the second class of distant kindred, *viz.*, the excluded or false maternal grandfather and great-grandfather, and that they take in preference to Nathu because one degree nearer, while they exclude Ahmad Din, their brother, who predeceased Mussammat Ruldo and his

heirs as more remote than themselves. The correctness of this explanation of the application of Muhammadan law, if applicable, was not disputed by the other side.

It was maintained that the plaintiffs were not entitled to sue at all, because Mussammat Ruldo was not really the child of Mussammat Lahoran, but only a *nauchi* entertained by her, because he himself was in possession of the whole house; because it had been bequeathed to him by Mussammat Ruldo by oral will; and because, in accordance with custom, which furnished the rule of inheritance amongst this particular caste of Kan-chans, the plaintiffs were not entitled to inherit on the ground that they had become married women, and that in any case the defendant Nathu was entitled to be reimbursed Rs. 125 of funeral expenses paid by him.

The first Court decreed the plaintiffs' claim to the extent of a two-sevenths share. It held that their marriages did not disentitle them to inherit, but yet that there was a special rule of inheritance permitting the principle of representation to operate. How the exact share was determined does not appear. The plaintiffs appealed to the Divisional Judge, and the defendant Nathu filed cross objections in which no reference was made to the claim for funeral expenses. The Divisional Judge accepted the plaintiffs' appeal and decreed their claim in full, regarding them as the sole heirs of the deceased. The defendant Nathu has now appealed to this Court. It is contended that the alleged relationship between Mussammat Ruldo and Mussammat Lahoran is not established; that custom furnishes the rule of inheritance and not Muhammadan law; that the defendant Nathu was entitled to succeed as adopted son and by bequest; and that he was at any rate entitled to be reimbursed the funeral expenses paid by him. It is contended that, in accordance with custom, the plaintiffs were at most entitled to a share along with the defendant. In argument, the contention was abandoned, that, according to the custom of the caste, the marriage of a daughter disqualified her from inheriting—the learned pleader for the appellant regarding this rule as too gross an outrage on morality for him to be able to advocate it, although he declared that the practice of exclusion on this ground was well supported by the evidence on the record.

The claim to be reimbursed funeral expenses was pressed on us, but we regard it as dropped in the Divisional Court by not being made a ground of objection.

The questions, therefore, which we have now to dispose of are three, *viz.*, the question of fact as to the relationship between the deceased and Mussammat Lahoran, the question of the factum of the will, and the rule of succession applicable to the parties.

On the former question, we have the concurrent findings of the Courts below: we have heard the evidence discussed at length on both sides and we have perused it. After full consideration, we find no reason for disagreeing with the conclusion arrived at. It is easy at this date to concoct a story that Mussammat Ruldo was not a child of the body, but a foundling who was picked up in the neighbourhood who was purchased from the finder for a sum of money, who was trained to Mussammat Lahoran's profession, and who succeeded to her property. The witnesses nearly all of them belong to the debased class to whom the parties belong, and little heed can be given to any statements from them not otherwise supported. An undoubted fact from which an inference may be drawn is of more weight than any quantity of such evidence. Now, according to the evidence for the defence as a whole, Mussammat Ruldo not being a daughter but a *nauchi* should not have succeeded to Mussammat Lahoran's property in the presence of heirs. She did, however, admittedly succeed, and, therefore, there is a very strong probability that the evidence that she was a daughter is the evidence to be believed. The documents opposed to this *viz.*, the lists of marriage presents, are very inconclusive, and might have been prepared, for all we know, specially for this case. As regards the alleged will, it is now on appeal to this Court attempted to be coupled with an alleged adoption, but we may disregard this fact entirely, as there is no evidence on the record with regard to the fact of adoption, or the effect of adoption according to the custom of the class. On this question of the will, we have not the advantage of a finding by the Divisional Judge. The first Court which had the witnesses before it was of opinion that the whole story of the alleged marriage of Nathu performed by Mussammat Ruldo, the opportunity taken for announcing the will, was a figment. It gives very good reasons for this opinion of the evidence, and in any case very little weight could be attached to the evidence, considering the partisanship of the witnesses and their character, they being drawn from the class to which the parties belong. We therefore affirm the finding on this point.

Lastly, we come to the question of custom. The institution through which prostitution is usually carried on in this country with its bearings on the holding of property and the succession to it, has been discussed at length in cases which have been reported, among which are *Punjab Record* No. 166 of 1888 and *Punjab Record* No. 95 of 1884. We concur generally in the conclusions therein arrived at. These cases had reference to Kanchans, residents of Delhi, but we do not find on the present record anything which should induce us to materially alter our opinions. We may point out that there is a material difference between a person holding or receiving an interest in an institution of this sort as a going concern, and his succeeding to property which has belonged to such an association on the death of the last associate. It is the latter case that we have now to deal with, and, in considering the evidence on the record, due allowance has to be made for this circumstance. Much that the witnesses say may indicate correctly the rules and practices of such associations, but have no bearing whatever on such a controversy as the present. In the evidence, at any rate, we are not furnished with any reliable instances bearing on the matter in dispute, which would enable us to ascertain the exact purport of the evidence and to test its value. We have also to make allowance for the bias of witnesses interested in and disposed to promote and support the institution as one governed by rules which can be recognized. There have been repeated inquiries in cases which have been reported, in order to ascertain by what custom these people are governed, as regards the holding of, and succeeding to property, but the result so far as appears has always been the same. It was so in the cases just cited in which people of the class in Delhi were concerned. A similar result was obtained in *Punjab Record* No. 98 of 1885, in an Umballa case, and also in *Punjab Record* No. 148 of 1889, which was a Lahore case. In the latter case, it was decided that as regards succession, married and unmarried daughters were on the same footing, which was a matter in issue in this case in the Courts below, although the plea was dropped in this Court. So, in this case, we think that, the result of the evidence duly considered and duly allowed for is not to establish the existence of any special custom in regard to succession. Muhammadan law was therefore properly had recourse to, to furnish the necessary rule. The appeal therefore fails and we affirm the decree of the Divisional Judge with costs.

Appeal dismissed.

No. 63.

APPELLATE SIDE. { MUSSAMMAT HAJRA,—(PLAINTIFF),—APPELLANT,
Versus
MEHR ALI BEG,—(DEFENDANT),—RESPONDENT.

Case No. 226 of 1891.

(STOGDON & BULLOCK, JJ.)

Indian Limitation Act, 1877, Schedule II, Article 103—Dower—Demand and refusal, nature of.

The demand and refusal to pay dower must be made in clear and unambiguous language, otherwise Article 103, Schedule II of the Limitation Act, 1877, will not come into operation (*cf.* 15 B. L. R. 306).

Further appeal from the decree of Colonel O. H. T. Marshall, Divisional Judge, Lahore, dated 23rd January 1891.

P. C. Chatterji, for appellant.

Piyare Lal, for respondent.

The principal question for consideration in this appeal was as to the true construction of Article 103, Schedule II, Limitation Act, as regards the nature of the demand and refusal to pay dower requisite to bring a case within the scope and operation of the Article.

The following judgments were delivered.

10th May 1892.

STOGDON, J.—Mussammat Hajra sued her husband Hakim Mehr Ali Beg for Rs. 550 on account of exigible dower. The suit was instituted on the 29th May 1890. Defendant replied that he had paid Rs. 1,100 on account of both exigible and deferred dower on the 7th February 1884 and held plaintiff's receipt for the same, and further that the suit was barred by limitation, demand of payment and refusal to pay having both occurred more than three years previously to the institution of the suit. The first Court found both points against him, but on appeal the Divisional Judge held that it was proved that plaintiff had demanded her exigible dower by written notice, dated 2nd September 1884, and that a few days afterwards defendant had refused to pay it. He therefore held that the suit, the limitation for which is governed by Article 103 of the Limitation Act, was barred by limitation and dismissed it. On plaintiff's application, he certified that there was a question of law involved, *viz.*, limitation, and plaintiff then preferred a further appeal to this Court. Respondent's pleader makes a preliminary objection that no question of law is involved. He

contends that there is no contest as to the limitation applicable to the case, and that the only contest is regarding a question of fact, *viz.*, whether defendant did or did not refuse to pay the exigible dower. A question of limitation is necessarily a question of law, and the only point for decision is whether the Divisional Judge rightly certified that a question of limitation was involved. *Primá facie* the only point in dispute is a question of fact, *viz.*, whether defendant did or did not refuse to pay the exigible dower. There is no dispute about the law applicable and therefore no question of law. I am not prepared to hold broadly that a question of law is involved in every case in which limitation is pleaded, but in the present case there are questions regarding the nature of the alleged refusal to pay dower and its sufficiency, to set limitation running, and as they are certainly questions of law, I think that the Divisional Judge was justified in certifying that a question of law was involved.

On the facts and law, we are unable to concur in the judgment of the Divisional Judge. Plaintiff sent a notice on the 2nd September 1884 through her pleader, Maulvi Barkat Ali, demanding payment of her exigible dower from defendant. Defendant admitted receipt of the notice and stated that four or five days afterwards he met Maulvi Barkat Ali and told him that the notice was illegal as he had paid the entire dower in February 1884. His statement was corroborated by his brother Wazir Ali and Kalu, mistri, and to a certain extent by Bulla Mall. Maulvi Barkat Ali admitted having had conversations with defendant, but he stated that to the best of his recollection defendant never told him that he had paid the dower or alleged that the notice had been wrongly sent. The story told by defendant and his witnesses is a very improbable one; and we are not prepared to accept it, but even if Mehr Ali Beg met Maulvi Barkat Ali in the bazar and told him in a casual manner that he would not pay his wife's dower, we do not consider that an expression of intention conveyed in such an informal manner is a sufficient refusal to pay dower to set limitation running. The decision of their Lordships of the Privy Council referred to by the first Court and published as 15 B. L. R., 306, shows that the demand and refusal must be clear and unambiguous, and even if the evidence of the witnesses is true, we are not prepared to say that there was such a clear and unambiguous refusal to pay the exigible dower as would have justified plaintiff in instituting a suit for its recovery.

The only other question is whether defendant paid plaintiff's dower on the 7th February 1884. The evidence regarding the alleged payment has been discussed by the first Court in detail and rejected as untrustworthy. In our opinion its finding is correct. It is quite impossible to believe that defendant who does not appear to be a man of means can have paid his wife both her exigible and deferred dower, and we have no doubt that he did not pay her a pice.

We accept the appeal and restore the decree of the first Court with costs throughout.

10th May, 1892.

BULLOCK, J.—I agree. I think that a question of law is involved and that the grant of a certificate by the Divisional Judge is not open to the objection that nothing but facts remain in dispute between the parties. There is in fact a very real question between them, the appellant contending that even giving the fullest weight to the evidence offered by the defendant it could give rise only to an ambiguous inference which would be insufficient to set the law of limitation in operation against the plaintiff.

The evidence does not in my opinion establish a clear and unequivocal refusal of payment, and I entirely discredit the reason assigned by defendant for his alleged refusal, viz., that he had already paid the dower of both kinds. I do not believe that he paid anything as a matter of fact: his assertion as to payment of the deferred dower appears incredible. Barkat Ali's evidence shows a desire on the defendant's part to temporize and treat for terms with regard to the payment of the dower due.

Appeal allowed.

No. 64.

SHARF-UD-DIN AND OTHERS,—(PLAINTIFFS),—

APPELLANTS,

Versus

NABIA AND ISMAIL,—(DEFENDANTS),—RESPONDENTS.

Case No. 109 of 1891.

(BENTON & RIVAZ, JJ.)

APPELLATE SIDE. {

Custom—Succession—Daughter's son—Muhammadan Awans, Ludhiana District.

Found, in a suit, the parties to which were Muhammadan Awans of the Ludhiana District, that agnates whose common ancestor was in the

tenth generation from the deceased, were entitled to succeed in preference to the daughter's son.

*Further appeal from the decree of G. Leslie Smith Esquire,
Divisional Judge, Umballa, dated 23rd December 1890.*

The sole point for decision in this appeal was as to the rights of the daughter's son in the presence of male agnates whose common ancestor was in the tenth generation from the deceased person whose property was in dispute.

The parties were Muhammadan Awans of the Ludhiana District.

The judgment of the Chief Court was delivered by

BENTON, J.—The parties are Muhammadan Awans of the Ludhiana District. The matter in dispute is the succession to a childless proprietor named Buta, who died many years ago leaving a widow, who has recently died. On her death possession of the estate was taken by the defendant Ismail, Buta's daughter's son. His claim is contested by the agnates whose common ancestor is in the tenth generation from Buta. Ismail's mother, the daughter of Buta, is dead, and he being a minor is represented by his father Nabia, who was a defendant, as being supposed to be in possession of the land before Ismail was ordered to be joined. Nabia had previously taken a mortgage of the land from Buta's widow, Mussammat Raji. They were sued by the plaintiffs as reversioners to have it declared that the mortgage should not affect the reversioners' rights after Mussammat Raji's death, and the plaintiffs obtained a decree. On that occasion it does not appear to have occurred to the then defendants, Nabia and Mussammat Raji, to set up the defence that the plaintiffs were not entitled to sue, there being a nearer reversioner, the daughter's son. This deserves to be noted.

The question to be decided is one of custom, whether the plaintiffs, as collaterals in the tenth degree from the common ancestor, are entitled to succeed in presence of a daughter's son.

The oral evidence on both sides is of exceedingly small account, no instances being cited in support of the assertions made. The first Court decided in the plaintiffs' favour in accordance with the tahsil *Biwaj-i-am*, in which the answer to Question 43, which is very full, and inquires whether there is any limit of relationship within which collaterals must stand

in order to exclude the daughter. The answer is to the effect that a daughter may only succeed if she be the wife of a *khana-damad*, and has always resided with her father. The Divisional Judge reversed this decision because he found that according to the answer to Question 52, with regard to sisters, and sister's sons, they were declared entitled to inherit in preference to collaterals descended from a common ancestor within five degrees of the deceased. He appears to have argued that there must be something wrong in the answer with regard to the daughter, otherwise the sister would not be entitled to a place in the succession while the daughter was refused any place whatever. The argument is a good one. It appears at any rate to follow that either the one answer or the other must be in error. The error, however, had been anticipated by the author of the Customary Law of Ludhiana at page 63. He there gives it as his opinion that in some cases sisters had been successful owing to the accident of there being no collaterals to dispute their claim. The case is very strongly put against the daughter, or the daughter's son's succession at page 60, except in the case of a daughter who has taken a vow to remain single, who would of course be living with her father, and in the case of certain Muhammadans and Hindu Jats and certain Rajputs, who allow her to succeed after collaterals related within five degrees, whether married or single. There is nothing to show that the plaintiffs are included among these last mentioned. *Prima facie*, considering the plaintiffs remoteness, the burden of proving that they are entitled to succeed in preference to the daughter's son is on them. Looking, however, to the records of customary law, which are very adverse to the daughter's succession, we think that it is shifted to the daughter's son and that it has not been discharged.

This view is, moreover, supported by the previous case against Nabia, with regard to this very land, in which the daughter's son was not thought of as an heir.

We therefore accept the appeal and restore the decree of the first Court with costs throughout.

Appeal allowed.

No. 65.

LIKAR & IDA,—(PLAINTIFFS),—APPELLANTS,

*Versus*GHULAM RASUL & OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1115 of 1890.

(ROE & STODDON, JJ.)

Custom—Sonless Gujar proprietor—Gurdaspur District—Gift to sister's sons—Collaterals in fourth degree.

Found that a gift of land by a sonless Gujar proprietor of the village of Garhmal in the Gurdaspur District in favour of his sister's sons, was invalid by custom in the presence of collaterals in the fourth degree.

Further appeal from the decree of C. P. Bird Esquire, Additional Divisional Judge, Amritsar, dated 14th June 1890.

Morton, for appellants.

Lewin, for respondents.

The only question in this appeal was as to the validity of a gift by a sonless Gujar proprietor in favour of his sister's sons in the presence of the donor's collaterals in the fourth degree.

The judgment of the Chief Court was delivered by

STODDON, J.—Ghulam Rasul, a sonless Gujar proprietor of the village of Garhmal in the Gurdaspur District, gifted 25 ghumaos, 1 kanal of ancestral land, to his sister's sons, Muhammad Bakhsh and Ali Muhammad, on the 11th September 1888, by registered deed of gift. Muhammad Bakhsh is son-in-law as well as sister's son of the donor. At the suit of the donor's collaterals in the fourth degree, the Subordinate Judge declared that the gift would not affect their rights on his death. His decree was reversed on appeal by the Divisional Judge, and plaintiffs have now appealed to this Court. Respondents' counsel has endeavoured to support the decree of the lower appellate Court on grounds found against his clients in the Courts below, viz., that the donees were appointed by Ghulam Rasul to be his heirs, and that Ghulam Rasul made Muhammad Bakhsh his resident son-in-law; but the first Court has given very good reasons in support of its finding that there was no appointment of the nature alleged. Had one been made it would probably

13th Jany. 1892.

have been invalid as opposed to the provisions of the *Riwaj-i-am*. It does not appear to have been ever pleaded that Muhammad Bakhsh was made a resident son-in-law, and there is no proof in support of the contention to that effect, which is now set up for the first time.

The case therefore turns entirely on the validity of the gift. The *Riwaj-i-am* permits written gifts to daughters and their sons. It does not expressly deal with gifts to sisters and sister's sons, but as it provides that a proprietor cannot make a gift of ancestral property to one heir to the exclusion of another, the natural inference is that he cannot make a gift of ancestral property to sister's sons, who are not heirs at all, to the exclusion of his near collaterals. A sister's son is a stranger in the sense that he belongs to a different got from his maternal uncle, and we consider that under these circumstances the burden of proving the validity of the gift was on the donees. It is clear that they quite failed to sustain it. The Divisional Judge has treated the five instances cited by them as conclusive, but the majority of them were either not well established or not in point.

No. 1 is the case of a gift to daughter's sons, who stand on a different footing from sister's sons.

No. 3 is rather in favour of plaintiffs than of defendants.

No. 4 is from the Hoshiarpur District. The burden of proof was probably placed on the wrong party.

No. 5 was not well established.

No. 2 occurred in the village of the donor some seven or eight years ago, but the gift is said to have been made with the consent of the collaterals.

No single instance is therefore wholly in point, and it is quite clear that the validity of the gift was not established. The oral evidence was pretty evenly balanced and not entitled to much weight.

We accept the appeal and restore the decree of the first Court with costs throughout.

Appeal allowed.

No. 66.

SEWA SINGH & ANOTHER,—(DEFENDANTS),—

APPELLANTS,

Versus

BUDH SINGH & OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

Case No. 870 of 1890.

(BENTON & RIVAZ, JJ.)

} APPELLATE SIDE.

Dharmasala—Right of worshipper at, to contest alienation of property attached to—Application of Section 539, Civil Procedure Code.

The plaintiffs were worshippers at a *dharmasala* and interested in the maintenance of the institution and preservation of the property intact.

Held, that in this capacity they had a *locus standi* to challenge certain alienations of property alleged and found to be *wagf* and attached to the *dharmasala*, not as self constituted representatives of the body of worshippers, who should have obtained an order under Section 30, Civil Procedure Code, but as persons themselves interested in the preservation of the property.

Held, further, that Section 539, Civil Procedure Code, has no application to a suit of this description.

Further appeal from the decree of U. P. Bird Esquire, Additional Divisional Judge, Amritsar, dated 20th March 1890.

Madan Gopal, for appellants.

P. C. Chatterjee and K. P. Roy, for respondents.

The plaintiffs, worshippers at a *dharmasala* in the city of Amritsar, sued to set aside certain alienations of property attached thereto and alleged to be *wagf*.

The defendants called in question the plaintiffs' right to sue, and further contended that the sanction prescribed by Section 539, Civil Procedure Code, was requisite.

The judgment of the Chief Court was delivered by

RIVAZ, J.—This suit was brought to set aside certain alienations of property alleged to be *wagf* and attached to a *dharmasala* in the Amritsar city. Both Courts have concurred in decreeing the claim. 27th Jan'y. 1892.

On appeal it is urged—

- (1) that the plaintiffs have no *locus standi* to maintain the suit and that any how sanction was necessary under Section 539, Civil Procedure Code ;

- (2) that the property in question is not proved to be *wagf* or attached to the *dharmsala* ;
- (3) that necessity for the alienation has been established.

As to the plaintiffs' *locus standi*, they are at least worshippers at the *dharmsala* and interested in the maintenance of the institution and in preserving the property intact. In this capacity we think that they have an undeniable *locus standi*, not as self constituted representatives of the body of worshippers, who should have obtained an order from the Court under Section 30, Civil Procedure Code, but as persons themselves interested in the preservation of the property, *cf. Manohar Ganesh Tambekar v. Lakhmiram Govindram* (I. L. R., 12 Bom., 247). We are further of opinion that Section 539 Civil Procedure Code, has no application to a suit of this description, and in support of this view it is sufficient to cite two decisions of this Court, Civil Judgments, No. 94, *Punjab Record* of 1885, and No. 122, *Punjab Record* of 1890, which we approve and follow.

As to the next point, we see no reason for differing from the finding of the lower Courts that the property in dispute is not private property, but belongs to the *dharmsala*. The deed of the 25th November 1866, which is the title-deed as regards the shops in suit, strongly suggests a gift to the *dharmsala* rather than to the then mahant as a private individual. But the best proof of the true interpretation of the deed is to be found in the statement made by defendant Hira Singh himself in 1875, when defending a suit against a claimant to the *gaddi*. In that case Hira Singh distinctly asserted that the shops in suit were *wagf* and belonged to the *dharmsala*.

As to the plea of necessity, it is not borne out by the evidence, and the finding of the first Court upon this point was not even challenged in the appeal to the Divisional Judge.

The appeal is dismissed with costs.

Appeal dismissed.

No. 67.

IFTIKHAR ALI,—(DEFENDANT),—APPELLANT,

Versus

SAHIB RAM & OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 619 of 1891.

(FRIZELLE & BENTON, JJ.)

Decree for pre-emption—Payment of purchase money in foreign circle notes—Punjab Laws Act, Section 17, and Civil Procedure Code, Section 214.

A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any objection, and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.

Held that the order of the lower Court was correct. Currency notes are money in the ordinary acceptation of the term although they may be notes of a different circle from that in which they are tendered. The words "purchase money" are not defined, and there is nothing either in Section 17, Punjab Laws Act, or in Section 214, Civil Procedure Code, 1882, to put a restricted or technical meaning upon them. *Punjab Record*, No. 70 of 1890, distinguished.

Held, also, that an appeal lay from the order in question under Section 244 (c), Civil Procedure Code, the order relating to the execution of the decree.

First appeal from the decree of Pandit Chandar Bal, Subordinate Judge, Gurgaon, dated 19th March 1891.

Madan Gopal, for appellant.

P. C. Chatterjee, for respondents.

This was an appeal under Section 244, Civil Procedure Code, arising out of an order made in connection with the payment into Court of the purchase money by a successful plaintiff in a pre-emption suit.

The following judgments were delivered—

BENTON, J.—This appeal has reference to the payment of 20th Feby. 1892. purchase money in a pre-emption case, amounting to Rs. 8,800. The latest date fixed for payment in the Court of Pandit Chandar Bal, Subordinate Judge, Gurgaon, was the 15th January 1891. On the 14th January, the plaintiffs, decree-holders, gave a petition addressed to Pandit Chandar Bal, to the Deputy Commissioner, along with currency notes of the Lahore and other circles in payment of the purchase money. Why the petition was presented to the Deputy Commissioner and not to the Pandit does not appear. The Deputy Commissioner, who is also a District Judge,

received it along with the notes, and directed the Nazir to receive them and to have them kept in the Treasury under single lock ; to enter the receipt in his register ; and to lay the matter before the Subordinate Judge. This order was complied with. The receipt was entered in the appropriate register. However, on taking the notes to the Treasury Officer he objected to them that some of them were foreign circle notes and not receivable under orders save in payment of revenue. The Court, that is to say Pandit Chandar Bal, passed an order on the 15th January reciting these facts, and giving the plaintiffs two more days to supply notes of the Lahore circle, or other legal tender money. This order was complied with.

A preliminary objection is taken that this appeal does not lie. I think there is no doubt that the appeal does lie under Section 244(c) of the Civil Procedure Code, as the order appealed against relates to the execution of the decree. The order appealed against is one refusing to regard the decree as null in consequence of the non-fulfilment of the condition requiring payment of the purchase money within a specified period.

I think the order of the Court below is correct, because the money tendered in payment, although it might have been objected to as not being part of it legal tender within this Province, was actually received, and because this possible objection was waived. The acceptance of the tender is, I think, clearly established by the Deputy Commissioner's order to the officer of the Court, the Nazir, and by that officer's conduct in complying with that order and receiving the notes, and by the order of the Court showing this and retaining the notes. After that order the Court and the Government became responsible for the repayment, and the plaintiffs had done what was required of them. The plaintiffs did, it is true, supply other money afterwards, but this was done for the convenience of the Court and does not in my opinion affect the case. The time was not in reality extended, nor could it be extended. The case is quite distinguishable from *Punjab Record*, No. 70 of 1890, in which no payment of money was made, but merely promissory notes of the required value were deposited.

I would therefore dismiss the appeal with costs.

20th Feby. 1892. FRIZELLE, J.—I agree that an appeal lies, and I concur in the order on the ground that currency notes are money in the ordinary acceptation of the term, although they may be notes of a different circle from that in which they are tendered.

The word "purchase money" is not defined, and there is nothing either in Section 17 of the Punjab Laws Act, or Section 214 of the Civil Procedure Code, to put any restricted or technical meaning upon it. There is a great difference in this respect between this case and *Punjab Record*, No. 70 of 1890.

Appeal dismissed.

No. 68.

MUHAMMAD RAFI & OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

KHAZAN SINGH & OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 131 of 1891.

(BENTON & RIVAZ, JJ.)

} APPELLATE SIDE

*Right to sue—Suit to contest alienation on ground of relationship—
Failure to prove allegations—Enquiry as to plaintiffs' rights as ultimate
heirs.*

The plaintiffs sued on the allegation that they were collateral heirs of S. S. in the fifth degree. The lower appellate Court, while agreeing with the Court of first instance that the plaintiffs had failed to establish any definite relationship to S. S., remanded the suit for an inquiry as to whether plaintiffs were not entitled to sue as the ultimate heirs, being members of the same gôt as S. S. and therefore presumably descended from a common ancestor and also being proprietors in the same division of the village. Ultimately it was decided that the plaintiffs could sue as being of the same gôt and patti as S. S.

Held, that the decree of the lower appellate Court must be reversed. No distinct relationship to S. S. and no custom entitling them to sue upon the grounds set up on their behalf by the appellate Court was established by the plaintiffs.

Punjab Record, No. 78 of 1888, referred to and distinguished.

Further appeal from the decree of G. Leslie Smith Esquire, Divisional Judge, Umballa, dated 3rd November 1890.

Morton, for appellants.

Browne, for respondents.

The plaintiffs sued to contest an alienation by the widow of Sahib Singh, deceased, alleging that they were collaterals in the fifth degree. This they failed to prove, but the Divisional Judge directed an inquiry as to whether the plaintiffs were not

entitled to sue as the ultimate heirs, being members of the same gôt as Sahib Singh.

The judgment of the Chief Court overruling this direction was delivered by

18th April. 1892.

RIVAZ, J.—The only question with which we find it necessary to deal on this appeal is as to the plaintiffs' *locus standi*. They sued on the allegation that they were collateral heirs of Sahib Singh in the fifth degree. This they failed to prove as held by the District Judge in his first judgment. The Divisional Judge agreed that the plaintiffs had failed to establish any definite relationship to the deceased Sahib Singh (whose widow's alienation is now challenged) but remanded the case for an inquiry as to whether plaintiffs were not entitled to sue as the ultimate heirs, being members of the same gôt as Sahib Singh, and therefore presumably descended from a common ancestor, and also being proprietors in the same division of the village. Ultimately it has been decided that plaintiffs can sue as being of the same gôt and patti as Sahib Singh, and Civil Judgment No. 78, *Punjab Record* of 1888, is cited and relied upon.

We do not think that the ruling in question intended to lay down any general rule governing all cases in which the plaintiffs being unable to prove any specific relationship to the deceased proprietor have been allowed to fall back upon an alleged custom, that as co-proprietors or members of the same gôt as the deceased their right to sue must be accepted. In the present case we find no distinct relationship to the deceased Sahib Singh established: and no good evidence of any custom entitling plaintiffs to sue merely upon the grounds first put forward on their behalf by the Divisional Judge. Did any such custom exist, it is strange that it was not alluded to by the plaintiffs themselves at the initial stages of the case.

We think that where plaintiffs' right to sue is formally contested, strict proof of their *locus standi* should be required, and they should not be allowed to maintain a suit like the present, upon the mere assumption that as members of the same gôt as Sahib Singh they are likely to have descended from some ancestor common to themselves and Sahib Singh, or are at least likely to be the ultimate heirs as co-proprietors of the patti. Had the case eventually put forward for the plaintiffs been originally alleged, it is likely that the defendant would have put forward the daughter and daughter's son of

Sahib Singh as at least in as good a position as ultimate heirs as the plaintiffs claimed to be.

We accept this appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

No. 69.

NATHA SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

JODH SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 26 of 1891.

(ROE, J.)

Custom—Adoption—Bhullar Jats, Lahore District.

Found that the custom of the Bhullar Jats of the Lahore District does not sanction the adoption of a person of a *ghair kaum*.

Further appeal from the decree of Colonel C. H. T. Marshall, Divisional Judge, Lahore, dated 2nd December 1890.

Shib Das, for appellants.

P. C. Chatterjee, for respondents.

The question for decision in this appeal was whether by the custom of the Bhullar Jats, Lahore District, an adoption of a person of a *ghair kaum* was permitted.

The appeal was remanded for further inquiry under Section 566, Civil Procedure Code, by the following interlocutory order made by

ROE, J.—I am inclined to think the contention is right 7th March 1891. that there was in fact an appointment of heir, of which the deed of 1873 is rather evidence than an actual will.

But on the question of custom, the *Rivaj-i-am* says distinctly that adoption must be confined to "*yak jaddis*:" the witnesses for plaintiff quoted decided cases in which adoption of *ghair kaum* had been set aside (see also No. 170 of 1882, *Punjab Record*), and defendants produced no instance of such an adoption being upheld. The question of custom is of some importance and the inquiry in the present case was not a very exhaustive one. I am willing to allow defendant a further opportunity of proving that by custom his appointment is

} APPELLATE SIDE.

valid, and I therefore issue notice with the view to a remand under Section 566, Civil Procedure Code.

30th April 1891. Mr. Chatterjee has no particular objection to the proposed remand : he wishes, however, to guard against the possibility of its being supposed that he admits the correctness of the opinion expressed in the opening sentence of my last order, that there had in fact been an appointment as heir.

It is of course perfectly understood that he makes no such admission. Nor did I myself intend to express any final opinion on the point. Should the return to the present order of remand show such evidence of custom in favour of appellant as would justify the admission of his appeal to a Bench, the whole case will of course be open to argument. My provisional opinion was stated simply as a reason for going more fully into the question of custom. Had I considered the fact of the appointment not apparently proved, there would have been no ground for further inquiry as to custom.

As regards custom I think, for the reasons stated, a further inquiry desirable. I therefore remand the case to the first Court under Section 566, Civil Procedure Code, in order that it may make as complete an inquiry as possible, both by taking any further evidence that may be offered by the parties (to *prove instances*, not mere expressions of opinion) and by itself consulting all available evidence in the shape of records of custom and of decided cases.

The evidence taken will be returned with a finding through the Divisional Judge, who is requested to add his own opinion in forwarding it to this Court.

The judgment of the Court finding the custom not proved was delivered as follows—

8th Decr. 1891. The return to the order of remand is a finding that the defendant has failed to prove any instance of the adoption by a Bhullar Jat of a stranger (*ghair kaum*) to establish that such an adoption would be valid by custom.

No objections have been filed to this finding. The *Riwaj-i-am* says of the Bhullars that their custom is the same as the Gils. The latter is thus described :

“If a proprietor have no sons, he may adopt a *yakk-i-jaddi* “*jo aqrub hove*, and if there be no *kariñi*, he may adopt a more “distant *yakk-i-jadli*, but he can never adopt a *ghair kaum* or “*ghair shufadar*.” Lala Shib Das who acted for appellants in

the Lower Court, states, (1) that he had five witnesses in attendance on 7th August, only one of whom was examined ; (2) that he referred the Court to the case of Gulab Singh v. Naurang Singh (in which he was engaged as pleader) decided by the Judicial Assistant in 1881, in which a full inquiry was made into the custom of the Gil Jats, and it was found that the adoption of a *ghair kaum* was allowed. The Court sent for and perused the judgment in that case, but is now found to have made no reference to it in his report.

I do not consider it necessary to order the evidence of the witnesses just referred to be taken. What was wanted was not oral evidence but a clear list of instances of the adoption by a Bhullar Jat of a *ghair kaum*, and this the defendant should have been prepared to give on 3rd August.

But before passing final orders I will send for the case referred to by Lala Shib Das, and if I consider that it discloses grounds for further inquiry I will give the parties notice for a further hearing. If it does not, the finding as to custom will be accepted, and the decision confirmed under Section 551. Civil Procedure Code.

I have referred to the case quoted. It was one in which *8th Jany. 1892-* the validity of an adoption by a Gil Jat of a Kalo Jat was in question. The first Court (Mr. Clifford, Judicial Assistant) held the adoption valid because (1) Hindu Law recognized the validity of the adoption of a stranger ; (2) although the *Riwaj-i-am* was against such an adoption yet he attached no weight to this because it appeared clear from the three precedents quoted in the margin of the clause that no previous adoption had occurred amongst the Gil Jats. The judgment of the Additional Commissioner (Mr. Baden Powell) on appeal deals almost entirely with other points of the case : it only devotes a few lines to the question of the validity of the adoption because the Judge found that in an unpublished case (No. 1372 of 1882), the Chief Court had upheld an adoption of a brother's daughter's son by a Gil Jat. I have referred to that case, and I find that the adoption in question was one by a Gil Jat of the Ferozepore District, and the factum of the adoption which had occurred long ago was almost beyond dispute. The Court held not that the general custom of the Gil Jats sanctioned the adoption, but that under *the particular circumstances of the case* it was for the defendants to prove that the adoption was invalid by custom, and that they had failed to do so.

I do not think that either of these cases afford any ground for holding that the custom of the Bhullar Jats of the Lahore District sanctions the adoption of a *ghair kaum*. The decision of the Lower Court is, therefore, confirmed under Section 531, Civil Procedure Code. The parties will pay their own costs in this Court.

Appeal dismissed.

No. 70.

GANGU,—PLAINTIFF,

Versus

ASAD,—DEFENDANT.

Case No. 69 of 1892.

(RIVAZ, J.)

REFERENCE SIDE. {

Jurisdiction of Civil Court—Mortgage by occupancy tenant—Mortgagee to receive half net profits without possession—Punjab Tenancy Act, 1887, Section 77 (k).

The defendant, a tenant with rights of occupancy, mortgaged his land to the plaintiff on the understanding that the mortgagor should retain possession and the mortgagee receive half the net profits of the tenancy.

The defendant withheld from the plaintiff his share of the profits : hence the present suit.

Held, that the suit was cognizable by the Civil Court, the plaintiff and defendant not being co-sharers "in an estate or holding" and clause (k) sub-section (3), Section 77, Punjab Tenancy Act, 1887, being therefore inapplicable.

Case referred by the Commissioner, Peshawar Division, under Section 100, Punjab Tenancy Act, 1887.

The question referred was whether the suit was cognizable by the Civil Court.

The facts of the case sufficiently appear from the judgment of the Chief Court.

15th March 1892. RIVAZ, J.—I think that this suit is cognizable by the Civil Court, though not exactly for the reasons stated by the Collector.

The defendant, a tenant with rights of occupancy, has mortgaged his land to the plaintiff on the understanding that the mortgagor shall retain possession, and the mortgagee receive half the net profits of the tenancy. Defendant has withheld from plaintiff his share of the profits, and hence this suit to recover the same.

The suit does not, in my opinion, fall within clause (k) of Section 77 (3) of the Tenancy Act, inasmuch as a tenant is not a "co-sharer in a holding" within the meaning of that clause. The term "holding" as used in the Tenancy Act has the meaning assigned to that word in the Land Revenue Act (*vide* Section 4 (9), Act XVI of 1887). "Holding," therefore, means "a share or portion of an estate held by one landowner, or jointly by two or more landowners" (Section 3 (3), Act XVII of 1887), and "landowner" does not include tenant (Section 3 (2), *ibid*). Although, therefore, I should be disposed to hold that the plaintiff and defendant in the present case are "co-sharers," they are not co-sharers in an estate or holding, and clause (k) of Section 77 has therefore no application. Nor can I find any other provision in Section 77 which applies to the present case.

Under Section 99 of the Tenancy Act, I direct the Assistant Collector to return the plaint to the plaintiff for presentation in the Civil Court.

Each party will pay his own costs on this reference.

Reference returned.

No. 71.

FAIZ-UD-DIN & OTHERS, (PLAINTIFFS),—APPELLANTS,

Versus

MUSSAMMAT WAJIB-UN-NISA, (DEFENDANT),—
RESPONDENT.

Case No. 1268 of 1889.

(FLOWDEN AND RIVAZ, JJ.)

AND

(BENTON AND RIVAZ, JJ.)

Custom—Succession—Moghuls of Kharkhodah, Rohtak District—Sister and sister's sons—Burden of proof.

Found, in a suit the parties to which were the descendants of a common ancestor, a Moghul, resident in the village or kasba of Kharkhodah in the Rohtak District, that it was proved that, by the custom of the village, a sister and a sister's son excluded descendants of the deceased's grandfather.

Held, also, that the burden of proof lay in the first instance on the sister and sister's sons claiming in opposition to the male issue of the grandfather; but that they had made out a *prima facie* case shifting the onus to the other side.

} APPELLATE SIDE.

As a general rule, by agricultural custom, females or the issue of females do not inherit ancestral land. Occasionally, daughters and daughters' sons do inherit after their father in the absence of sons. More rarely, sisters and their issue inherit after brothers. The right to succeed of females and their issue, when it exists, generally exists only in presence of remote collaterals, and the sons of a grandfather of deceased are not remote collaterals.

*Further appeal from the decree of E. W. Parker Esquire,
Divisional Judge, Delhi, dated 7th August 1889.*

K. P. Roy, for appellants.

Madan Gopal, for respondent.

This was a contest regarding ancestral land in the village or *kasba* of Kharkhodah in the Rohtak District. The parties were descendants of a common ancestor who was a Moghul.

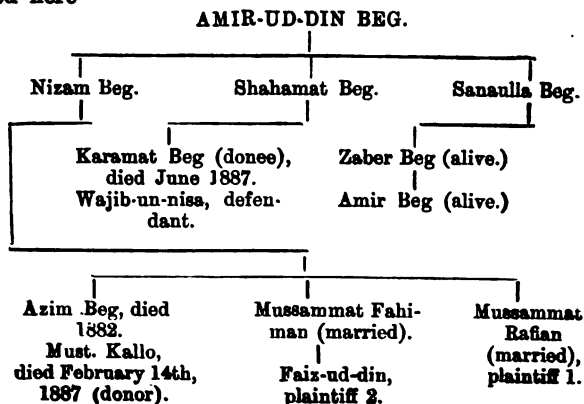
The points for determination and the facts in connection therewith fully appear from the following interlocutory order made by

1st May 1891.

PLOWDEN, J.—This is a further appeal in a suit about ancestral land in the village or *kasba* of Kharkhodah. The Courts have differed, but the suit has been eventually dismissed upon the ground that the plaintiffs have no *locus standi*, and this is the point which we have first to determine, and the only point which up to the present has been argued in this Court.

It is admitted that the question is one governed by custom, and not by Muhammadan law: in the first instance, Kharkhodah is a large village of Muhammadans, comprising Sayads, Sheikhs, Moghuls and, it may be, other tribes. The parties to this suit are descendants of a common ancestor who is a Moghul.

The pedigree table so far as it is material may be reproduced here—



The precise question is this, whether Azim Beg and his widow being dead without issue, his sister and his sister's son were heirs to Azim Beg, to the exclusion of the sons of his uncles, that is, the male issue of his grandfather, Amir-ud-din Beg, whom Europeans would call first cousin of Azim Beg.

We had a very long and able argument addressed to us by the counsel of the parties, which raised the following points: (1) whether the burden of proof lay on the plaintiffs; (2) if so, had the plaintiffs made a *prima facie* case; (3) if so, had defendants rebutted it.

Of reported decisions in this Court, the plaintiffs relied upon No. 82 of *Punjab Record*, 1887, which may be called Jawad Ali's case; and the defendants upon No. 173 of *Punjab Record*, 1889, which may be called briefly Bunyad Ali's case. In the latter case, the precedents cited in Jawad Ali's case and the case itself are considered, and all these precedents will need to be considered in this case.

But we may point out, at the outset, that the two cases above mentioned are not in conflict. They are both cases regarding land in Kharkhodah, and they are both cases among Sayads.

No. 82 of *Punjab Record*, 1887, decides, more or less positively, that, by custom in the village of Kharkhodah, sister's sons are not excluded by male issue of the *great-grandfather* of the deceased brother.

No. 173 of *Punjab Record*, 1889, decides that no custom is proved by which sisters' sons inherit in presence of issue of the *grandfather* of the deceased brother.

Even if the latter case had decided positively (which it does not) that sister's sons do not inherit in the presence of issue of the grandfather, the two decisions would not be in conflict. The result of the two would be that sister's sons would among Sayads of Kharkhodah be excluded by male issue of the grandfather, and would exclude male issue of the *great-grandfather*.

As to the burden of proof in the first case, I think that, broadly viewed, it rests in the first instance upon the plaintiffs, the sister and sister's son, claiming against male issue of the grandfather.

As a general rule, by agricultural custom, females, or the issue of females, do not inherit ancestral land. Occasionally

daughters and daughters' sons do inherit, after their father, in the absence of sons. More rarely sisters and their issue inherit after brothers. The right to succeed of females and their issue when it exists, generally exists only in presence of remote collaterals, and the sons of a grandfather of the deceased are not remote collaterals. I think, therefore, that the burden of proof lies at the outset on the plaintiffs, and it was so held in *Bunad Ali's case* (No. 173, *Punjab Record*, 1889).

The second question is whether they have made a *prima facie* case to shift the burden on to defendant; and for the reasons which will be stated, it appears to me that they have.

In the first place, in regard to succession of daughters and sisters and their issue, the weight of the burden of proof is not precisely the same in all cases. Speaking generally, in relation to succession, the household and the village are institutions regarded with favour by custom. A daughter who remains in the father's house after marriage is peculiarly favoured, and often transmits his land to her own descendants. A daughter who marries usually quits her father's house and becomes a member of a different family, and often is married into a family resident in another village. She is then generally regarded as having ceased to be a member of the household of which she was by birth a member. On the other hand, we sometimes find, especially among Muhammadans, that the rights of daughters are recognised by custom when they are capable of marrying and do marry male descendants of a common ancestor, and their rights would presumably be more readily recognised when the daughters had married husbands residing in the same village. As a class, daughters who have never left their native villages are in a better position to assert their claims to take the family estate than daughters resident in another village, who have severed their connection with their own village. In *Kharkhodah* it appears that daughters frequently marry residents of the village.

In the next place, when marriage into a different *gôt* involving, as it usually does, migration to another village is not obligatory, the position as regards succession of a daughter and of a sister is not so vastly different as it is when such marriages are obligatory. It may indeed from a particular point of view be regarded as identical. For if a man have a son and a daughter, and the son dies childless and widowless, and custom permits the succession of his sister, this special

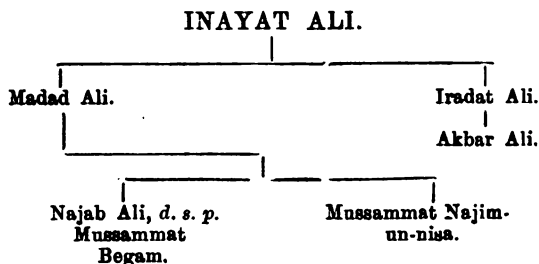
custom may be described in regard to the ancestral property with equal accuracy, either as the right of the daughter to succeed on the death of the father's son, without issue, to the ancestral estate held by the father; or the right of the sister to succeed to the ancestral estate held by the brother. The general practice of custom, when the question is, who is the heir to ancestral estate held by a sonless man, is to look back to his ancestors for the heirs of the nearest male ancestor of the deceased leaving such heirs, commencing in the search with the father of the deceased. And according to this practice, the succession in the case supposed would more properly be described as the succession of a daughter to the father's ancestral estate on extinction of his issue in the male line.

In the present case, I gather from the evidence given on both sides that, according to the custom of the village, sisters do not inherit in the presence of brothers, but when a man dies leaving daughters only, they do inherit. One instance is given of the daughters of Bahadar, by witness (Rahim-uddin) No. 4, for plaintiffs, which is not, I think, explained away by witnesses 1 and 2 for defendant. There is a reported case of Sayads in Kharkhodah, No. 46 of *Punjab Record* 1890, in which a sonless father's land devolved upon his daughter, and then upon her son. That this is the custom is, in my opinion, rendered more probable by the next case which I shall discuss (Mussammat Najim-un-nisa), a case of succession of a daughter on the son's widow's death to exclusion of a first cousin of the deceased son. For if this be a good instance, *a fortiori* would a daughter in the absence of sons succeed her father to exclusion of a first cousin. It is also rendered more probable that the custom exists by the unquestionable facts in the case of Mussammat Bibi-un-nisa, to be presently mentioned.

The first instance to be discussed is that of Mussammat Najim-un-nisa, the fact of the four precedents cited in the two printed cases of Jawad Ali and of Bunyad Ali, No. 82 of *Punjab Record*, 1887, and No. 173 of *Punjab Record*, 1889. This was a case of Sayads of Kharkhodah.

As to this instance, the plaintiffs contend that the custom now relied upon was proved, and that the case was decided on Muhammadan law. I have referred to the original record in both Courts, and both contentions appear to me correct.

The table is as follows :—



On the widow's death Mussammat Najim-un-nisa sued Akbar Ali for Najab Ali's land. This is a claim which might be described in either of two ways with equal accuracy, *viz.*, as the claim of a daughter to the ancestral land of her father, on the death of his son and son's widow, in preference to the son of the father's brother; or as the claim of a daughter to succeed her brother in the ancestral property. The defendant asserted a preferential right. Now it is to my mind a very significant and weighty fact that, granting the evidence is

Three for plaintiffs meagre, *all the witnesses for both parties* and four for defendants. *agreed* that after the son's widow the father's daughter excluded the nephew. I am therefore unable to assent to the view taken of this case by my learned colleague, Mr. Justice Stogdon, in No. 173 of *Punjab Record*, 1889 (page 598), that the Court and the parties appear to have overlooked the real question.

The Commissioner on defendant's appeal wholly misapprehended the case. He regards Mussammat Begam, the widow, as a mere interloper, and put the question of the rights of the parties as one for decision according to Muhammadan law.

On the remand to the first Court, both parties repudiated the Muhammadan law as governing their rights, and both relied on custom. Defendant, Akbar Ali, put his case on two conflicting grounds: first, that his father and Najab Ali, and after him Najab Ali's widow, were joint; and, second, that the widow on Najab Ali's death took as sole proprietor and had made a gift, as she had power to do, to Akbar Ali's son. The final decision according to Muhammadan law is under these circumstances of no weight.

The agreement of all the witnesses in the first Court as to the daughter's right in preference to the nephew appears to me of great weight. This case is exactly in point. The defendants attempt to explain it away as being a case of succession by a daughter, and by suggesting that the plaintiff never enjoyed her decree. This leaves the unanimous evidence untouched

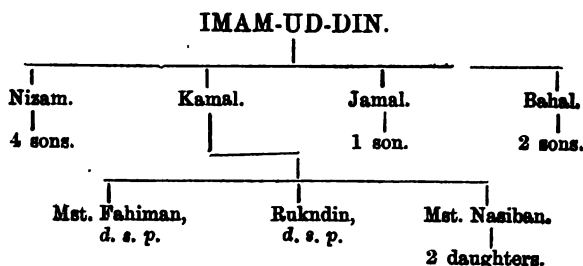
The next instance to be mentioned is that of Mussammat Bibi-un-nisa, a case of Sayads of Kharkhodah. The table is set out in full at page 599 of *Punjab Record*, 1889. The pedigree and the note I find are extracted from the settlement record.

This case is not exactly in point, because, assuming that the sons of Mir Baki survived him, Mussammat Bibi-un-nisa excluded descendants of the great-grandfather of deceased, and not of the father.

The evidence in the present case is in conflict as to whether the sons of Mir Baki survived their father or not. Putting aside this evidence, the tenor of the entry in the pedigree table certainly seems to me to be in favour of the view that Mussammat Bibi-un-nisa succeeded on the death of her brothers, and not of her father. But even if it be otherwise, then it is unquestionable that, in default of sons on the death of Mir Baki, his daughter succeeded as heir. It is nearly as important to the plaintiffs to be able to show that a daughter succeeds as heir in default of sons, as to show that after a brother, a sister excludes his grandfather's male issue.

The next case is that of Mussammat Fahiman and Mussammat Nasiban, also discussed at page 599 of *Punjab Record*, 1889—a case of Sheikhs Koreshi of Kharkhodah.

The table is given thus, partly on the settlement records and partly on the evidence in this case :—

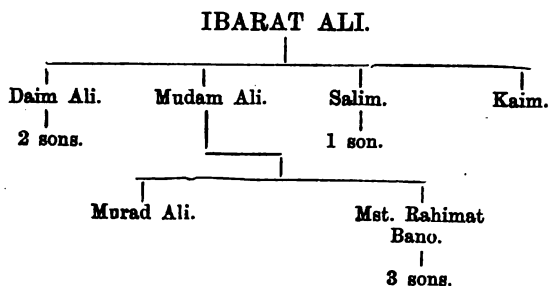


The two daughters of Kamal married two of their first cousins on the death of Rukndin without male issue and unmarried; the two sisters succeeded. When Mussammat Fahiman died childless in 1886, her sister Mussammat Nasiban succeeded, and dying soon after, her two daughters succeeded her. The files of the two *dakhil kharij* proceedings in 1886 show their succession to have been duly entered without objection.

This case is in point, and in view of the admitted fact that there were descendants of the grandfather beside the two husbands, and that the husbands did not take on the death of their wives, it seems of a greater weight than was given to it in the judgment No. 173 of *Punjab Record*, 1889, where the existence of their other collaterals is not noticed. Now the defendants try to get rid of this precedent by alleging that a will was made by Kamal-ud-din in favour of his daughters, as heirs after the death of Rukndin, with whom they were to live. This will appears to be now mentioned for the first time, and is certainly not proved.

Of the fourth case cited at *Punjab Record*, 1889, page 599, sufficient particulars cannot be obtained, and neither party relied upon it before us.

But yet there is another instance in the evidence given in the present case by the plaintiffs' witness Sadik Ali, a case of Sayads of Kharkhodah. The table is given below :—



On Murad Ali's death the three sons of his sister succeeded, and some of the property came into the family of the witness through them. The defendant says that this is an untrustworthy witness, but the ground for this is not apparent. No attempt was made to show in what respects his statement was incorrect.

These are not all cases of Moghuls, but they are all cases in Kharkhodah, and it is not contended that the custom of Sheikhs, Sayads and Moghuls differ: and no case has been objected to on this ground.

Now, in my opinion, the instances and considerations above set out make a strong *primâ facie* case for the plaintiffs, sufficient to shift the burden on to the defendants of showing that male issue of the grandfather of a deceased man exclude his sister or his father's daughter.

This I do not think they succeed in doing. The case on which they rely is *Bunyard Ali's case*, No. 173 of *Punjab Record*, 1889, which has been already examined with reference to the cases cited in it. That case, as already pointed out, only goes so far as to decide that in it a custom was not proved by which in *Kharkhodah* sisters' sons exclude the male issue of deceased's grandfather. In the present case we have not only the evidence considered in that case, but an additional instance, and facts brought to notice which were not considered in that case.

The result of this view is that, in my opinion the plaintiffs' have succeeded in proving their *locus standi* in the present case. In arriving at this conclusion I have entirely put aside the evidence of *Zafir Beg* and his son *Amir Beg*, who cannot be regarded as trustworthy witnesses, even though they appear to be speaking against their own interest. It is quite possible that at present they are colluding with the plaintiffs against the widow of *Karamat Beg*.

At the same time, I think it is expedient to guard against this judgment being quoted as an authority for any more general proposition as to the rights of sisters and their sons against the near collaterals than is actually decided, by pointing out that the only two questions really decided are, that the burden of proof lies on the plaintiffs, and that it is proved in this case that by the custom of *Kharkhodah* a sister and sister's sons exclude collateral descendants of the deceased's grandfather.

If my learned colleague concurs in the view expressed that the plaintiffs have a *locus standi*, the preliminary point being decided in plaintiffs' favour, the question of the factum and the validity of the will, which is attacked by the appeal, may be argued in Court on a date to be fixed in the usual manner.

RIVAZ, J.—I concur. Let a fresh date be fixed as suggest- 1st May 1891.
ed by my learned colleague.

The final judgment of the Court was delivered as follows by

BENTON, J. (RIVAZ, J., concurring). The chief question in 14th Jan'y. 1892. the case, viz., the right of the plaintiffs to succeed to *Azim Beg*, was decided in their favour by the order of the Court, dated 1st May 1891.

We have to-day heard the parties with regard to the factum of the will ascribed to Azim Beg, and dated 12th September 1882, apparently just one month before Azim Beg's death.

The learned pleader who appeared for the plaintiffs devoted the greater part of his argument to showing that the will was not genuine. He had very little to say with regard to its validity. After perusing the evidence and hearing counsel on the other side with regard to the genuineness of the will, we did not find it necessary to consider the latter question. We are of opinion that the genuineness of the will is not established. It purports to have been written by the patwari, Inayat Ali, and to have been attested by eight witnesses. It was not produced until more than a year after Azim Beg's death, the application for mutation under it having been made to the authorities only on the 28th November 1883. This delay in itself affords some reason for suspecting the genuineness of the will; but this ground for suspicion is much increased by the undoubted fact that, previous to this, the widow, Mussammat Kallo, must have been before the Revenue authorities to obtain mutation of her husband's estate in her own name. These latter mutation proceedings have not been sent up, and we are unable to obtain any explanation how it came to pass that Mussammat Kallo then omitted to get the mutation made under the will. When mutation was made under it, the widow and four other witnesses, including among them Inayat Ali, patwari, were examined. Although the will had been put forward by the widow as the occasion for the transfer, strange to say the patwari makes no mention of it, although it had been written by himself, but refers to an oral will; and another witness, Rahim-ud-din, also speaks of an oral gift. In the present case four witnesses were examined to prove the will, but the most essential witness of all, the patwari, was not amongst them. Our attention has been drawn to the fact that each witness is made to state that the testator came to him by himself and got him to attest the document, and it is suggested that the transaction has been arranged in this way in order to obviate any difficulty that might arise if the witnesses were cross-examined as to the coming and going of other attesting witnesses, or as to the circumstances under which they came to attest it. This circumstance undoubtedly should not be overlooked.

Altogether, there are so many suspicious circumstances in connection with the will of which no satisfactory explanation

has been offered, that we are driven to the conclusion above announced that its genuineness is not established.

We accordingly accept the appeal and decree the plaintiffs' claim for the lands sued for in full, with costs in all the Courts.

Appeal allowed.

No. 72.

GANGA SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

INDAR SINGH AND OTHERS—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

CASE No. 596 of 1890.

(RIVAZ AND STOGDON, JJ.)

Custom—Alienation—Childless proprietor—Sindh Jats, Mauza Sindhwan, Jullundur District—Illegitimacy.

Pound, in a suit the parties to which were Sindh Jats of the village of Sindhwan, tahsil Nawashahr, Jullundur District, that no custom was proved conferring on a childless proprietor an unrestricted power of alienation of ancestral land in the presence of nephews.

The sons of the deceased, their mother being the wife of another man, must be deemed to be illegitimate.

Punjab Record, No. 84 of 1889, and No. 49 of 1890, referred to.

Further appeal from the decrees of T. Troward Esquire, Divisional Judge, Jullundur; dated 31st March 1890.

Rattigan and P. C. Chatterjee, for appellants.

K. P. Roy, for respondents.

This was a suit by the nephews to contest an alienation by a childless Sindh Jat of Mauza Sindhwan in the Nawashahr tahsil of the Jullundur District (his natural sons being held to be illegitimate).

The facts sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—The parties to this litigation are Sindh Jats of Mauza Sindhwan in the Nawashahr tahsil of the Jullundur District, and the claim is by the nephews of one Narain Singh for a declaration that a sale by Narain Singh of his ancestral land for Rs. 4,000 in favour of defendants Nos. 2, 3 and 4, 24th Feby. 1892.

will not affect the plaintiffs' reversionary interests in the land sold.

The material pleas of both vendor and vendees were (1) that the plaintiffs had no *locus standi*, as Narain Singh had lineal heirs, two sons and one daughter; (2) that the vendor was by custom competent to alienate, even without necessity; and (3) that necessity for the alienation as a fact existed.

The lower Courts have concurred in holding that plaintiffs have a right to sue, as Narain Singh has no legitimate offspring, and that no necessity for the alienation has been established, but they differ as to the custom prevailing among Sindhu Jats of this locality. The District Judge is of opinion that custom permits alienations by childless proprietors without any restriction, while the Divisional Judge holds that no good proof exists of an unrestricted power of alienation.

We have had the advantage of hearing the appeal very fully argued, the questions involved being those already noted as raised by the defendants' pleas.

As to the plaintiffs' *locus standi*, we agree with the lower Courts that Narain Singh's sons must be considered as illegitimate, as the husband of Mussammat Malan, their mother, is still alive, and it would be contrary to public policy to recognise any custom (even if such could be shown to exist) which, under such circumstances, recognised the connection between her and Narain Singh as tantamount to a valid marriage. No. 84, *Punjab Record* of 1889, was relied upon in this connection; but in that case it was found that the former husband had divorced his wife, and that custom recognised his power to do so. The case reported as No. 49, *Punjab Record* of 1890, is more in point and supports the view taken by the lower Courts.

The issue of custom was argued at great length. In our opinion we must hold (applying the Full Bench ruling No. 107, *Punjab Record* of 1887) that the presumption in the present case is against the existence of a custom allowing alienation except for necessity. To this effect is the provision in the *Wajib-ul-arz*, which thus coincides with the initial presumption ordinarily to be made in cases of this class. The question which then arises is, has this presumption been sufficiently rebutted by the present defendants. Their learned counsel relies, first, upon the pedigree table of the village, as showing that the village, though originally

founded by Sindhu Jats, is now composed of mixed tribes; that all traces of ancestral right have disappeared, so far as the shares are concerned; that many alienations by gift and sale to outsiders, as well as among Sindhus, have taken place, as evidenced by the *shajra nasab* itself, by deeds of sale, and by oral evidence. We have examined the village pedigree table and the rulings cited by either party. It may be conceded that several families of outsiders have obtained a footing in the village. But this is to a great extent explained by the necessity for admitting certain classes of outsiders, such as Brahmans, Jhewars, Chamars, Lohars, Tarkhans and the like, while, as to almost all the alleged alienations, the defendants have failed to show the circumstances under which they took place, or that they or many of them were not for necessity. We are by no means satisfied, after a full consideration of all that has been urged on either side, that such a free power of alienation has been exercised without objection as to amount to proof of a custom placing no restraint upon a childless proprietor's powers in this respect, and we think that the finding of the Divisional Judge upon this part of the case must be upheld.

As to necessity, the lower Courts have both disposed of the question in a very perfunctory manner. The details of the consideration as stated in the deed of sale are as follows :—

	Rs.
Paid before the Sub-Registrar	1,757
Paid to Narain, Brahman, for bonds 	300
Paid on a mortgage	1,740
Paid on bonds... 	160
Registration expenses ...	43
<hr/>	
Total ...	4,000

Both Courts believe that full consideration passed, and there is sufficient evidence to show that the amounts due on mortgages and bonds were real debts, and were in fact liquidated by the vendee. It seems to us that the vendee in the present case is sufficiently protected as regards these items, if he can show that he satisfied himself before concluding the sale that the debts were really due, and then proceeded to see that they were duly discharged. The largest item

(Rs. 1,740) was due on a mortgage of this very land, dated the 10th March 1885, which had been preceded in 1883 by a mortgage for Rs. 900, neither of which transactions had been challenged up to the date of the sale. We think that Rs. 2,200 out of the Rs. 4,000 must certainly be held to have been advanced for necessary purposes, without requiring the vendee to demonstrate that each item, if traced to its origin, bears the undoubted stamp of necessity. We cannot hold that any necessity has been made out for the cash items, and we must therefore disallow them.

We accept this appeal, and in modification of the decree of the Divisional Judge, we declare that the alienation in question will not affect the plaintiffs' reversionary rights, except to the extent of Rs. 2,200, which amount they will have to pay to the defendants, vendees, before they can recover the land.

Each party may properly be left to bear his own costs in all the Courts.

Decree varied.

—
No. 73.

SHEO CHAND,—(PLAINTIFF),—APPELLANT,

Versus

**CHUNNA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.**

Case No. 1455 of 1891.

(BENTON AND RIVAZ, JJ.)

Mortgage—Absence of covenant to pay interest after due date—Allowance of, by way of damages—Charge.

A deed of mortgage contained no covenant for payment of interest *post diem*.

Held, that interest could notwithstanding be allowed by way of damages—in so far as such damages were within limitation (six years)—and be declared a charge upon the mortgaged property.

Further appeal from the decree of R. L. Harris Esquire, Divisional Judge, Delhi, dated 7th October 1890.

Lakhshmi Narain, for appellant.

The main question for determination in this appeal was whether, where a mortgage deed contained no covenant for payment of interest *post diem*, interest could notwithstanding be

APPELLATE SIDE. {

allowed by way of damages and be charged upon the mortgaged property.

The judgment of the Chief Court was delivered by

RIVAZ, J.—This was a suit by a mortgagee for possession of 12th April 1892. immoveable property mortgaged by defendants' father to the plaintiff on the 16th October 1883. The terms of the deed were that the mortgagor would retain possession, and repay the principal amount (Rs. 285), with interest at the rate of Rs. 1-9-0 per cent. per mensem, on the 3rd December 1884. In default of payment upon that date, the mortgagor agreed to deliver possession to the mortgagee. The deed contains no agreement as to interest *post diem*. The mortgage-money was not repaid upon the due date, and the mortgagee has therefore filed the present suit (on 27th March 1890) for possession of the land, claiming to hold the same in lieu of Rs. 543, viz., Rs. 285 principal, and Rs. 258 interest, at the rate of Rs. 1-9-0 per cent. per mensem from the date of the deed till the date of suit, allowance being made for an item of Rs. 78 admitted to have been paid towards interest by the defendant in October 1889. The first Court decreed possession in lieu of Rs. 500, plaintiff having relinquished Rs. 43 out of the interest claimed. The Divisional Judge varied the decree by giving possession in lieu of Rs. 285 only. He held that Rs. 110 had been paid to interest; that this sum represented more than the stipulated interest between October 1883 and December 1884, and that no interest could be allowed as a charge on the land after the latter date.

The plaintiff appeals. It is clear that the Divisional Judge has wrongly held that Rs. 32 have been proved to have been paid to interest over and above the Rs. 76 admitted by plaintiff. The dates and the admissions of defendant show that the item of Rs. 32 endorsed on the back of the deed is included in the Rs. 78 allowed for by plaintiff.

The main point for consideration upon this appeal is whether the Divisional Judge was justified in disallowing all interest after the 3rd December 1884. Now it seems to be well settled by the Indian authorities, following the rule laid down in *Cook v. Fowler* (L. R. 3, H. L. 27), that "where interest is contracted for up to a certain date, without any mention of subsequent interest, any claim for interest after the time to which the contract extends would be a claim for damages, and it would then be for the Court to consider whether interest

“should be awarded for damages.” (Leake on Contracts, 1,100.) Again it is said:—“In mortgages containing a covenant to pay the principal and interest on a certain day, without mention of interest in default of payment, interest after the day cannot be claimed under the covenant, but is recoverable only as damages for the breach; it is, however, considered from the nature and object of the security to be intended by the parties that the debt should continue to bear interest, and therefore it is the constant and invariable practice to give interest by way of damages in such cases and at the same rate of interest.” (*Ibid*, 1,104.) The view that interest *post diem* is to be regarded as damages has been applied in several cases decided in this country, and this has led to the decision that unless such damages are claimed, in the case of a registered contract, within six years of the date of the breach, the claim will be rejected as time-barred (*vide* I. L. R., 8 All., 486; 10 All., 85; 11 All., 416; 13 All., 330; 19 Calc., 19; and No. 8 *Punjab Record* of 1890). But the above cases do not decide, and some of them expressly reserve, the question whether, when the suit is within time, so far as it relates to the claim for damages, the amount found due should not be made chargeable upon the land mortgaged. And that is the question which arises in the present case. We see no reason why the amount which we consider to be due for interest *post diem* should not be declared to be a charge upon the land. There seems to be no good reason why the mortgagee should be compelled to press for immediate payment of this part of his claim by means of a money decree, apart from his decree for possession of the land, and if the position of the parties was reversed and the mortgagor was claiming redemption, we see no reason why he should regain his land until he had paid all sums due, whether for interest *ad diem*, or interest, as damages, *post diem*.

It remains to consider what will be a fair amount to decree as damages, and we think we are not bound to allow interest *post diem* at so high a rate as Rs. 1-9-0 per cent. per mensem. We consider that if we allow interest from the 3rd December 1884 to the date of suit (27th March 1890) at 12 annas per cent. per mensem, this will suffice.

The result is that the decree will be that plaintiff is entitled to possession as mortgagee in lieu of Rs. 285 principal, and interest at Rs. 1-9-0 per cent. per mensem from 16th October 1883 to the 3rd December 1884, and interest at

12 annas per cent. per mensem from the 4th December 1884 to the 27th March 1890, less Rs. 78 admittedly received.

The plaintiff will receive costs in proportion to the amount decreed in all the Courts.

Decree varied.

No. 74.

MUSSAMMAT AISHAN & ABDUL HAQ,—(DEFENDANTS),—
APPELLANTS,

Versus

} APPELLATE SIDE.

MUHAMMAD JAMIL & OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 668 of 1889.

(BENTON AND STODDON, JJ.)

Custom—Alienation—Gift by mother of last male owner—Sayads and Pathans of Basti Baba Khel, Jullundur District.

Found in a suit, the parties to which were Sayads, or possibly Pathans, settled in the village or kaaba of Basti Baba Khel in the Jullundur District, not agriculturists in the strict sense of the term (their ancestors being said to have been horse dealers), that a presumption existed in favour of the right of collaterals in the ninth degree from the last male owner to contest a gift by the said owner's mother (who had been recorded as a proprietor of half the estate on the death of her son, the other half being to his widow) in favour of a son of her late husband's sister, and that the donor and donee had failed to rebut the presumption.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 24th April 1889.

Rattigan, for appellants.

P. C. Chatterjee, for respondents.

This was a suit to contest an alienation made under circumstances which are detailed in the judgment of the Chief Court which was delivered by

STODDON, J.—

25th March 1892.

KUTB-UD-DIN.

Nizam-ud-din, predeceased his father, leaving a widow
Musammam Aishan.

Ismail d.s.p., leaving a widow,
Musammam Bibi Jan.

Musammam Hatim married to
Muhammad Shah.

Abdul Haq.

The land in dispute belonged to Kutb-ud-din, a Barki Baki Khel of Basti Baba Khel in the Jullundur District. His son Nizam-ud-din predeceased him. On the 25th June

1864 he gave his estate to his grandson, Ismail, who died on the 31st March 1880. On his death, his mother Mussammat Aishan and wife Mussammat Bibi Jan were recorded as proprietors of his estate in equal shares. On the 20th September 1886, Mussammat Aishan gifted her half of the land, together with a dwelling house, to Abdul Haq, the son of her husband's sister Mussammat Hatim. Plaintiffs who are collaterals of Ismail, the last male owner of the property, in the ninth degree, according to the method of calculation propounded in the judgment of this Court published as *Punjab Record*, No. 126 of 1890, sued for a declaration that the gift would not affect their reversionary rights on the death of Mussammat Aishan. Their suit was dismissed by the first Court, the decree of which was reversed on appeal by the Divisional Judge. Both donor and donee have now appealed to this Court.

It appears from the history of Basti Baba Khel attached to the settlement pedigree that it was founded nine generations ago by Haji Khwaja Dad, Barki Baki Khel; Faujdar Khan, Barki Ghuz; Wali Dad Khan and others, who migrated from Kani Kurram near Kabul. Plaintiffs and Ismail are descendants of Haji Khwaja Dad Khan. Abdul Haq is a descendant in the male line from Wali Dad Khan and in the female line from Haji Khwaja Dad Khan. It is doubtful to what tribe the parties belong. They are said to be Sayads, but in a suit brought by Kutb-ud-din against Mussammat Rabia, he described himself as a Pathan. The matter is not very important. Whether Sayads or Pathans, the parties can hardly be considered to be agriculturists in the true sense of the term. Their ancestors are said to have been horse dealers, who settled at Basti Baba Khel, because they found good pasture there and the place is said to be entitled to be ranked as a small town.

It is clear that they do not follow strict Muhammadan law, and it is equally clear that in matters of inheritance their females are favoured to a greater degree than females of the agricultural classes, whether Hindu, or Muhammadan converted from Hinduism. Appellants' counsel has referred to many instances in which daughters have succeeded to the estates left by their fathers, and to one or two in which they have succeeded to the estates left by their brothers. They are not very applicable to the present case. Only one or two instances of alienations by widows have been quoted, and I cannot find a single case of an alienation by the mother of the last male

proprietor. Most of the instances cited occurred in the families of founders of the village other than Haji Khwaja Dad Khan and five of them are in the family of the donee, Abdul Haq, in which there seem to have been several cases of intermarriage between near relatives. In this family there is an instance in which Mussammat Hanifa, widow of one Abdul Rasul, gave his estate to their daughter, Mussammat Umran, who was married to her father's brother's son, Abdul Satar. The first cousins of Abdul Satar objected to mutation of names, but their objection was overruled. Considerable inquiry was made regarding the custom, and two of the present plaintiffs admitted that a widow could gift her husband's property to her daughter or daughter's son. The matter never came before the Courts, and it is obvious that there is a very great distinction between such a gift and the gift now in dispute. It is useless to refer to each of the instances relied on by the learned counsel. They may make out a strong case for the succession of daughters, especially when they are married to near collaterals, but they have very little bearing on the present case.

There are two cases of succession of sisters or their sons. In one of them a collateral, six degrees removed, claimed the estate of one Lal Muhammad against Lal Muhammad's sisters. An arrangement was come to by which he took two-fifths and they took three-fifths. This case does not establish anything one way or the other. The second case is one of a bequest by a male proprietor to the sons of his sister, who were also his nearest collaterals. It is not in point.

The only cases which have occurred in the family of the parties are cases of succession of daughters and their sons, but two of them, Mussammat Baidan and Mussammat Khadija, were married to collaterals. Mussammat Baidan was mother of Kutb-ud-din, who thus inherited a portion of his estate from his mother. Plaintiffs 7, 8 and 9, sons of Umardaraz Khan, also obtained a portion of their estate from their mother Mussammat Khadija and her sister Mussammat Bibi Sahib, who does not appear to have been married. From all this it may be gathered that daughters are probably entitled to succeed to their father's estate on the death of their mother if he has left no sons and they are married to collaterals. A gift by a widow to such daughter or daughter's son would probably be not objected to, because she would be merely anticipating the course of succession. Whether a daughter married to a stranger would

be entitled to succeed is another question. It is very probable that she would be excluded by near but not by distant collaterals.

We can find, however, no authority for holding either that Abdul Haq has a better right than plaintiffs to succeed to Ismail's property, or that Ismail's mother was entitled to alienate it to him. The *wajib-ul-ars* does not provide for such a case and Mussammat Aishan's possession of a half share of Ismail's property appears to be due rather to an amicable arrangement made between her and Ismail's widow than to any right she possesses to it. According to the *wajib-ul-ars*, on the death of a sonless proprietor, his widow will obtain possession of his estate, but she will not be entitled to sell or mortgage it to her brother or father or their collaterals. She may, however, sell or mortgage for necessity. This clause shows that a widow is not considered to be full proprietor of her deceased husband's estate, though it is possible that her status may not be identical with that of a Hindu widow, and that distant collaterals of her husband may not be entitled to contest alienations made by her; but as far as I can judge the majority of cases of succession of females and the few known cases of alienation by them have resulted in the retaining of the property within the family, that is to say, it has usually gone to a collateral of the last male proprietor, although it may have gone to one to the exclusion of others. In the present case, Ismail's aunt Mussammat Hatim was married out of Haji Khwaja Dad's family, and if the gift to Abdul Haq is maintained, the estate will pass into another family. I can find little or nothing to support the validity of such an alienation, and I am of opinion that there is a presumption in favour of the right of such distant relatives of Ismail as plaintiffs are to contest it. As defendants quite failed to rebut that presumption, I would dismiss this appeal with costs.

25th March 1892. BENTON, J.—I entirely concur in the view taken of the case as a whole by my learned colleague and in the conclusion arrived at. The appeal is dismissed with costs.

Appeal dismissed.

No. 75.

NUR MUHAMMAD & OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

ALIMULLAH,—(DEFENDANT),—RESPONDENT.

Case No. 1386 of 1890.

(BENTON & STODDON, JJ.)

} APPELLATE SIDE.

Custom—Adoption—Arains of tahsil Nakodar, Jullundur District.

Found in a suit, the parties to which were Arains of tahsil Nakodar in the Jullundur District, that no custom was proved authorising the adoption of a wife's brother's son, the burden of proof being upon those setting up such adoption.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 1st October 1890.

Oertel, for appellants.

P. C. Chatterjee, for respondents.

The main question in this appeal was as to the factum and validity of an adoption. The parties were Arains of tahsil Nakodar in the Jullundur District.

The facts sufficiently appear from the judgment of the Chief Court which was delivered by

BENTON, J.—The suit has reference to a portion of the estate 7th March 1892. of one Hassan, an Arain of tahsil Nakodar in the Jullundur District, who died about 1880, leaving a widow, Mussammat Lado, in whose favour the estate was recorded at mutation in 1883. The plaintiffs are in the fourth degree from the common ancestor, while Hassan is in the third degree. The object of the suit was to have it declared that a deed of gift executed by Mussammat Lado on the 6th April 1888, in favour of Alimullah her brother's son, shall not affect the reversionary rights of the plaintiffs.

The defence was that Alimullah was adopted by Hassan by a declaration made in presence of the brotherhood a few days before his death. Hassan, it was said, had brought up Alimullah from his infancy and married him to his daughter. Mussammat Lado had executed a gift of half of her husband's land in favour of Alimullah, because she had been so directed by her husband.

The first Court decided in favour of the plaintiffs, and decreed their claim. The Divisional Judge reversed this deci-

sion on the ground that the fact of the adoption was established, and that the adoption of a wife's brother's son was valid according to custom.

In appeal to the Divisional Judge the defendants for the first time sought to base Alimullah's claims on his being a *khana damad*. The Divisional Judge properly does not appear to have considered this ground of appeal at all, as the matter had not been raised in the first Court. It has been again pressed here for the defendants, but we think it does not deserve consideration as it was not put forward in the first Court; nor could there be any inquiry as to the appointment of Alimullah as *khana damad*, or as to such an appointment conferring on him any title to succeed to Hassan in accordance with the custom of the tribe. The very fact of this claim being put forward only in the lower Appellate Court appears to indicate that the defendants felt doubts as to whether the claim to succeed as adopted son could be maintained.

We are of opinion that neither the fact nor the validity of the alleged adoption can be held to be established. The adoption is an unusual one. The burden of proving its validity was undoubtedly on the defendants who asserted it. No documentary evidence of custom was adduced, although *Punjab Record*, No. 159 of 1890, shows that such evidence, at least in the case of Jats, exists, and that the *riwāj-i-am* would not permit of the adoption of even a daughter's son. The evidence in support of the fact of the adoption deserves very little consideration as the witnesses are mostly hostile to the plaintiffs and have had quarrels with them.

It is very improbable that the deceased would have kept Alimullah all his life and only adopted him at the last moment. There would appear to have been no intention to adopt in 1875 when the plaintiffs sued both Hassan and Alimullah and got a deed of mortgage declared invalid as against them. The adoption was not then mooted. Mutation took place in favour of the widow without mention of the adoption.

The instances cited to prove such an adoption valid are hardly any of them in point and are altogether insufficient to prove the validity of an adoption of a wife's nephew.

We therefore accept the appeal and restore the decree of the first Court with costs in all the Courts for the plaintiffs.

Appeal allowed.

No. 76.

UMAR AND OTHERS—(PLAINTIFFS),—APPELLANTS,

Versus

MUSSAMMAT SAHIB KHATUN AND OTHERS,

—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 107 of 1891.

(BENTON AND STODDON, JJ.)

Custom—Will—Nún Mussalman Jats, tahsil Bhakkar, Dera Ismail Khan District.

Found in a suit, the parties to which were Nún Mussalman Jats of the Bhakkar tahsil of the Dera Ismail Khan District, that no custom was established authorizing the bequest of land in favour of a daughter and her sons.

*Further appeal from the decree of M. L. Dames Esquire,
Divisional Judge, Derajat, dated 16th December 1890.*

Oertel, for appellants.

Shircore, for respondents.

The main question in this appeal was as to the validity by custom of a will in favour of a daughter and her sons.

The parties belonged to a section of Mussalman Jats, named Nún, in the Bhakkar tahsil of the Dera Ismail Khan District.

The judgment of the Chief Court, holding the will to be invalid, was delivered by

BENTON, J.—The plaintiffs sue to obtain possession of the estate of one Ahmad, their collateral in the fourth degree, which he is alleged by the defendants, his daughter and her sons, to have bequeathed to them some days before his death, which occurred on the 27th November 1889. 6th March 1892.

The parties belong to a section of Mussalman Jats, named Nún, of the Bhakkar tahsil of the Dera Ismail Khan District.

Both the factum and the validity of the will are in dispute. The first Court found that the testator was not in a sufficiently sound state of mind to make a will shortly before his death, the will being dated 25th November, and it also held that a valid will could not be made in presence of agnates so near without their consent.

The Divisional Judge came to a different conclusion on both points. No doubt a will executed in a last illness is always open to suspicion. The witnesses in support of the will testify that the testator was in high fever at the time.

He would appear to have died of pneumonia. Notwithstanding, we think that the Divisional Judge's conclusion on this point is the correct one. Though suffering from illness, there is every reason to believe that the deceased was in full possession of his senses. It was a natural thing for him to make provision for the daughter and her offspring who were living with him at the time, so that no undue influence need be suspected to have been at work to induce him. The calling in of Government officials and respectable neighbours to witness it is a guarantee that what was being done would, it was thought, bear inspection.

The validity of the will rests entirely on the *Riwaj-i-am*. The words in para. 9 (*bila mumaniat*) have occasioned some difficulty. They occur both in the question and in the answer. The question runs: What power has a proprietor in the absence of issue to make bequests (*bila mumaniat mustahiqqân-i-jaddi*)? The words in both question and answer are superfluous it appears. The persons who would naturally object to bequests are the agnates or nearest heirs, and these words appear only to convey a meaning which would be implied in any statement on the subject. What power is there to childless proprietors to make bequests (without prevention, power of prevention, or interference by the heirs), the question asks, and the answer is in the same terms. It is contended by the learned counsel for the appellants that they mean, with the consent or sanction of the heirs. This would render the provision meaningless and valueless. Generally speaking, any one may make any bequest whatever with the consent of those who are entitled to object, and such a truism would not have been worth recording. As it happens, however, it matters little how these awkward words may be construed. The validity of the will, as in accordance with custom, rests, as has been said, entirely on the provision in the *Riwaj-i-am*. There is no evidence whatever to support it. It must be admitted that it is a very unusual rule to be found prevailing among Jat agriculturists, and there is all the more necessity that it should be well established. The record of custom was prepared by a Settlement Superintendent, and it contains clear indications that, at least as regards this matter of bequest, he had undertaken a task for which he was not qualified. He seems not to have known what a bequest was, for in his remarks he speaks of the testator putting the legatee in possession. The instances he gives in support of the provision are all instances

of gifts. The only oral evidence adduced in the present case on this part of the case has reference to gifts.

The information given as to the customary law of this part of the Province in *Tupper's Customary Law*, Volume II, 247, 248, is very meagre; but it goes to show that such a will as the present would not be valid. Wills are said to be very rare. In the case of sons there is apparently no power of disposition, save for the purpose of making an equal distribution of property. Gifts to daughters or others accompanied by possession would generally be allowed to stand. If, however, the donor were old and, though in possession of his faculties, no longer capable of exercising an independent will, dispositions of property favouring one heir at the expense of another, even if accompanied by possession, would usually be set aside. All this goes to show that there is a very restricted power of alienation, and that the power of bequest can scarcely be said to exist at all.

We are accordingly compelled to the conclusion that the will which has been set up in the present case is not sanctioned by custom, and is invalid.

We accordingly restore the decree of the first Court, and allow the appellants their costs in all the Courts.

Appeal allowed.

No. 77.

MUHAMMAD SHARIF KHAN,—(PLAINTIFF),
—APPELLANT,

Versus

ABBAS KHAN AND OTHERS,—(DEFENDANTS),
—RESPONDENTS.

Case No. 180 of 1890.

(ROE AND FRIZELLE, JJ.)

Khanship, Peshawar District—Property specially attached to, or governed by ordinary rules of succession.

Found, upon the evidence, that the property in dispute was not permanently attached to a Khanship in the Peshawar District, but was subject to the same rules of succession as the other landed property of the Khan.

} APPELLATE SIDE.

First appeal from the decrees of F. Field Esquire, District Judge, Peshawar, dated 24th December 1889.

Rattigan, for appellant.

K. P. Roy, for respondents.

The only question in this appeal was whether the property in dispute was attached permanently to a Khanship in the Peshawar District, or was subject to the same rules of succession as the other landed property of the Khan.

The judgment of the Chief Court was delivered by

6th April 1892.

ROY, J.—The question before us is whether the property in dispute is attached permanently to the Khanship, or is subject to the same rules of succession as the other landed property of the Khan.

It has no doubt been in fact held by the Khan from its acquisition down to the death of Ibrahim Khan. It was acquired and held by Baba Khan: it was next held by his son and successor in the Khanship, Aziz Khan, and from him it passed to Ibrahim Khan.

But it appears to us quite clear from the proceedings of 1856 as set forth in the *rubakar* of Captain James, dated 23rd April 1856, and the agreement of 24th idem, that Hamzakot was then treated not as an appanage to the Khanship but as part of the ordinary estate. The *rubakar* sets forth that there is a dispute about the partition of the estate of the late Khan which it is desirable to settle: it directs that unless the parties can make a partition themselves, arbitrators are to divide the estate into five equal portions without assigning any particular portion to any particular son, or knowing what the assignment will be, and the Deputy Commissioner will then make the assignment himself. A passage in the *rubakar* as translated at the top of page 2 of the supplementary papers, favours the idea that a portion of the estate was to be reserved for the Khanship, but a reference to the original, as well as to the context, shows clearly that this is not the case. The words are *aur yehbhi darj ho ki is daftar men kuch bataur khani* * * *jawega; iwaz khani ke sirkar ne muwajib wa guzar kiya: kuch hissah dastar ka ziada nahin chahiye*. It is contended for the appellant that the word left blank should be read "*likha*" and that the translation is right. It is very difficult to say what the word really is; it appears to us that it is "*nalaga*" and that it cannot possibly be "*likha*." But even if it were "*likha*" or any

equivalent word, we should say that a “*na*” must have been accidentally omitted, for the meaning of the passage, as a whole, clearly is that nothing is to be set aside out of the estate for the “*khani*,” as the “*Khan*” gets the Government grant. It is quite certain that, as a fact, nothing was set aside for the *khani*: the estate was divided by the parties themselves into five portions, of which Aziz Khan took one, which included Hamzakot, and in his statement of 15th August 1865, he distinctly said that he took this as his portion of the inheritance. It is, however, contended that even if Aziz Khan did not take Hamzakot as Khan, he attached it to the Khanship by his will dated 20th March 1869 (page 11 of the printed record). We do not think this is the correct interpretation of the will. It does indeed say that he gives Hamzakot to Ibrahim Khan (*ba sabab taqarruri khan*), but this is merely a reason for the gift, and is a very different thing from attaching the village to the Khanship permanently. Had Aziz Khan intended to do this he could, and doubtless would, have expressed this intention in unmistakable terms. We find, therefore, that the property in dispute was not attached to the Khanship by Aziz Khan, and there is certainly no ground for alleging that it was so attached by Ibrahim Khan.

We consider that the decree of the lower Court should be affirmed, and we dismiss this appeal with costs.

Appeal dismissed.

No. 78.

KISHEN SINGH,—(DEFENDANT),—APPELLANT,

Versus

LAHAB SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1380 of 1891.

(ROE, J.)

Guardian and ward—Lease of ward's property to guardian—Introduction of outsider into management of ancestral holding.

The District Judge appointed L. S., a connection by marriage guardian of the property and person of a minor, on the ground, apparently, that he was willing to take the minor's land on a lease of Rs. 1-3-0 per ghumao instead of Rs 1-0-0 offered by K. S., the minor's grand-uncle.

Held, that the appointment must be cancelled. Not only is lease to a guardian of his ward's land most objectionable, but also the effect of the District Judge's order would be to transfer the control of a large share in an ancestral holding from the family of the

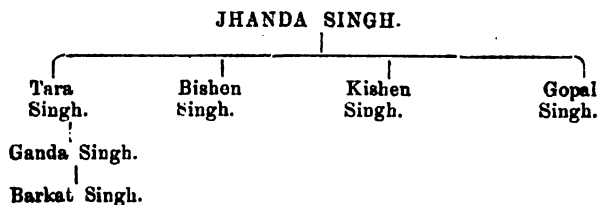
co-sharers to the family of another tribe, i. e., to the husband of the father's sister. Such an order would only be justified if it were clearly proved that the members of the minor's own family were unfit to be his guardian.

First appeal from the order of Lieutenant G. C. Beadon, District Judge, Gujranwala, dated 6th November 1891.

The question in this appeal was as to the propriety of the appointment of one Lahab Singh as guardian of the person and property of one Barkat Singh, a minor, whose father's sister was married to Lahab Singh.

The judgment of the Chief Court, reversing the order of the District Judge, was delivered by

22nd March 1892. ROE J.—It appears that the parties are thus related—



Lahab Singh, who had married the sister of Barkat Singh's father, gave a petition alleging that Barkat Singh was a minor, aged four, owner of an estate of some 50 ghumaos, valued at some Rs. 2,500; that after his father's death he had been living with him, petitioner; that his near collaterals, Kishen Singh, &c., had an interest in his death; and he therefore prayed that he, Lahab Singh, should be appointed guardian of the minor's person and property.

The application was opposed by Kishen Singh, who stated that since his father's death, which occurred during the cholera time, the minor had lived with him since his father's death until, on pretence of a visit, Lahab Singh had got possession of him, and now strove to get his land.

The Tahsildar, to whom the petition was referred, reported that Kishen Singh and his brothers were men of good character and position: that they had treated the boy well after his father's death, and there was every reason to believe that they would do so in future.

The District Judge has, however, appointed Lahab Singh guardian both of the property and person of the minor, apparently solely on the ground that he is willing to take the minor's land on a lease of Rs. 1-3-0 per ghumaos instead of Re. 1 per ghumaos offered by Kishen Singh.

The order appears to me a most improper one. In the first place, any lease to a guardian of his ward's land is most objectionable: in the second place, under no circumstances should such a lease form part of an order of appointment.

But apart from this objection, the effect of the District Judge's order will be to transfer the control of a large share (apparently one-third) in an ancestral holding from the family of the co-sharers to the family of another tribe, *i.e.*, to the husband of the father's sister. Such an order would only be justified if it were clearly proved that the members of the minor's own family were unfit to be his guardians. The report of the Tahsildar shows that there is no such unfitness in the present case.

It is admitted that the minor's mother is dead: had she been alive she would probably have been entitled to be appointed guardian of the person, Kishen Singh being appointed guardian of the property. As it is, I appoint Kishen Singh guardian both of the person and property, and direct the District Judge to have the necessary orders drawn out.

Lahab Singh will pay the costs of these proceedings throughout.

Appeal allowed.

No. 79.

GANPAT,—(PLAINTIFF),—APPELLANT,

Versus

KIRPA RAM AND KHANAYA LAL,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1170 of 1890.

(BENTON & STODGON, JJ.)

Indian Limitation Act, 1877, Schedule II, Articles 97 and 115—Suit to recover amount paid out of Court in execution of decree.

The defendant, K. L., obtained a decree against plaintiff for Rs. 2,347 and employed the other defendant, K. R., to execute the decree as his agent under a formal power of attorney.

The plaintiff in the present suit alleged a payment of Rs. 900 in cash to the agent on 3rd February 1885.

On 2nd November 1887, execution of the decree was sued out without credit being given for the Rs. 900, and on 28th February 1888 K. L. denied the receipt of the money through his agent and declined to give credit for the amount.

On 22nd April 1889, the plaintiff (in the present suit) sued to recover the Rs. 900 alleged to have been paid.

Held, that the suit would lie and was governed either by Articles 97 or 115, Schedule II of the Indian Limitation Act, 1877, and was within time.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 24th March 1890.

Kishen Singh, for appellant.

Shib Das, for respondents.

This was a suit to recover Rs. 900 and damages under circumstances which appear from the following judgment of
19th March 1892.

BENTON, J.—The material facts in the case are as follow: The defendant, Khanaya Lal, had a decree against the plaintiff for Rs. 2,347, for the execution of which he employed the other defendant, Kirpa Ram, as agent, giving him a power of attorney for the purpose, defining his powers. The plaintiff alleges that he paid to this agent Rs. 900 in cash, and also he gave him Rs. 860 in hundis payable at 90 days in satisfaction of the decree. A receipt was taken for the money and the hundis, dated 3rd February 1885. Subsequently, on the 2nd November 1887, execution of the decree was sued out without credit being given, and on the 28th February 1888 Khanaya Lal denied receipt of the money through his agent, and refused to give credit for the payment. The plaintiff brings this suit on the 22nd April 1889 to recover the Rs. 900 alleged to have been paid in cash, admitting that the hundis were not paid.

The first Court decided the case on the merits, and also held that it was barred by limitation. The Divisional Judge decided the case on the question of limitation alone, with regard to which he concurred with the first Court, and found that Article 62 of Schedule II of the Limitation Act was applicable. The question we have now to decide is whether the suit is barred by limitation or not. We are unable to see how Article 62 can have any application to the facts of the case, or how the money sued for can be regarded as money payable by the defendants to the plaintiff for money received by the defendants for the plaintiff's use. The money seems to have been paid by the plaintiff to the defendant's agent, that the defendant might apply it to his own use.

The money was undoubtedly paid to the defendant's agent, if it was paid at all, on the understanding that the

decree should be held satisfied to the amount paid, and that execution should not be sued out in respect thereof, and this understanding was violated when execution was sued out on the 2nd November 1887, and again on the 28th February 1888, when Khanaya Lal distinctly declined to give credit for the money. The Allahabad High Court in I. L. R., 8 All., 275, expressed an opinion in a short judgment that Article 97 or Article 120 of Schedule II and not Article 62, applied to a case in many respects similar to the present. The Madras High Court in I. L. R., 5 Mad., 397, regarded a suit like the present, to recover money paid out of Court to satisfy a decree, as a suit to recover damages for the breach of the implied promise to certify the payment to the Court, and thereby make it effectual in execution. This very nearly corresponds with what we regard as the correct view of a case like the present as above expressed, and so the Article applicable would be No. 115, as if the suit were for compensation for the breach of an implied contract not to execute.

Thus the breach occurred when execution was demanded, without reference to it, on the 2nd November 1887, and the suit is within time. The same result would follow if we regard the case as one of failure of consideration with the Allahabad High Court in I. L. R., 8 All., or with this Court in *Punjab Record*, No. 83 of 1884. There was failure to give satisfaction of the decree to the extent of Rs. 900 when execution was sued out, notwithstanding the payment, or at any rate when the decree-holder's attention was drawn to the matter on the 28th February 1888, and he distinctly refused to recognise the payment. The suit was brought within three years of those dates, and was within time under Article 97 of Schedule II of the Limitation Act.

We have throughout assumed in the foregoing remarks that the plaintiff's contention is right that there was a payment of Rs. 900 at the date of the receipt; but the parties are at issue with regard to this and other matters. We find that the case has been wrongly decided by the Divisional Judge on a question of limitation, and we remand it to him for disposal on the merits, in accordance with Section 562 of the Civil Procedure Code. The Court fee will be returned, and other costs will abide the result.

STODOL, J.—I concur. The question whether a suit of 19th March 1892. the nature of the present one will lie has often been considered

by the Courts of this country, and the answer has generally been in the affirmative. The following may be quoted among other rulings bearing on the subject—

- (1.) 5 B. L. R., 223, F. B.
- (2.) 3 Calc., L. R., 414.
- (3.) I. L. R., 5 Mad., 397, F. B.
- (4.) I. L. R., 8 Mad., 277, F. B.
- (5.) I. L. R., 3 All., 538.
- (6.) *Punjab Record*, No. 83 of 1884.

There is some diversity of opinion as to the grounds on which such a suit is maintainable. In case No. 1, the learned Chief Justice expressed an opinion that the defendant must be considered as being a trustee for the plaintiff of the money which had been previously paid, and which she had not appropriated to the satisfaction of the decree, and had, indeed, by her omission to certify the matter to the Court, prevented it from being so appropriated. In case No. 3, Turner, Chief Justice, held that the suit was one to recover damages for the breach of the implied promise to certify the payment to the Court, and thereby make it effectual in execution. In case No. 2 the Judge of the Small Cause Court, who made the reference, suggested that the decree-holder had entered into a tacit contract to abstain from suing out execution, if not to certify adjustment, so that when he did sue out execution he committed a breach of that contract,—a breach causing injury to his judgment-debtors, and such an injury as he was bound in law to compensate. The view of the Mairas High Court was adopted by Mr. Justice Barkley in his decision in case No. 6.

If plaintiff's allegations are true, there was an implied contract on the part of his decree-holder to certify to the Court the payment made by him. This contract was broken when the decree-holder sued out execution for the money already paid, and refused to certify payment to the Court. Plaintiff's cause of action arose on that date. I do not consider that it arose on the failure of the decree-holder to certify the payment, as that failure might have been due to negligence and not to any intention to repudiate the payment, and if plaintiff had brought a suit he might have been met with an answer that it was premature, or that the defendant had never refused to certify the payment. Some overt act of denial of payment or refusal to certify was necessary in order to confer a cause of action upon the plaintiff. Article 115 of the Limitation Act

applies, in my opinion, to the case. Article 97 may also be applicable as far as the sum of Rs. 900 is concerned, but it could hardly apply to the sum of Rs. 200 claimed as damages.

Appeal allowed : cause remanded.

No. 80.

KHAIR-UD-DIN,—(PLAINTIFF),—APPELLANT,

Versus

**MUSSAMMAT BUDHI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.**

} **APPELLATE SIDE.**

Case No. 14 of 1892.

(BENTON & RIVAZ, JJ.)

*Indian Limitation Act, 1877, Section 23—Suit for custody of wife—
Third persons harbouring wife—Continuing wrong.*

A third person who harbours a runaway wife is guilty of a continuing wrong, and under the operation of Section 23, Indian Limitation Act, 1877, a fresh period of limitation begins to run at every moment of time during which the wrong continues, the section being more comprehensive in this respect than the corresponding provision of the Act of 1871.

The limitation applicable to a suit by a husband for the custody of his wife is to be found in Articles 34, 35, Schedule II, Limitation Act, 1877.

Punjab Record, No. 60 of 1879, F. B., followed.

*Further appeal from the decree of Colonel H. J. Lawrence,
Divisional Judge, Sialkot, dated 24th October 1891.*

Ishwar Das, for appellant.

Bhagwan Das, for respondents.

This was a suit for custody of a wife, the defendants being the wife and other persons who were, it was alleged, harbouring her and preventing her from returning.

The lower Courts dismissed the suit as barred by limitation.

The judgment of the Chief Court, holding the suit to be within time, was delivered by

RIVAZ, J.—This suit, which is by the plaintiff for the custody 21st April 1892. of his wife, Mussammat Budhi, who is alleged to be prevented from returning to him by the other defendants, has been dismissed by the lower Courts as time-barred, the Full Bench decision

of this Court No. 60, *Punjab Record* of 1879, having been ignored. On the authority of that ruling (which was passed under Act IX of 1871) the present suit is clearly within time as regards Mussammat Budli, and it is not barred under the present law even as against the other defendants, as Section 23 of the Limitation Act of 1877 provides for a fresh period of limitation beginning to run in the case of every continuing wrong at every moment of the time during which the wrong continues, the section being more comprehensive in this respect than the corresponding section of Act IX of 1871. The case in I. L. R., 13 All., 126 (at page 151), is also an authority for holding that a third person who harbours a runaway wife is guilty of a continuing wrong.

The appeal is accepted, and the case returned to the Divisional Judge to be disposed of on the merits.

The stamp on this appeal will be refunded and other costs to be costs in the cause.

Appeal allowed: cause remanded.

No. 81.

APPELLATE SIDE. {

SAHIB DIN AND ALLA DITTA, — (PLAINTIFFS), —
APPELLANTS,

Versus

FATTEH DIN & KHAIR MUHAMMAD, — (DEFENDANTS), —
RESPONDENTS.

Case No. 381 of 1891.

(RIVAZ & STODDON, JJ.)

Custom—Adoption—Ghair qaum—Kalwal Jats (Muhammadans), tahsil Kharian, Gujrat District.

Found in a suit, the parties to which were Kalwal Jats (Muhammadans) of the Kharian tahsil of the Gujrat District, that no custom was proved recognising the adoption of a person of a ghair qaum, such as a wife's brother's son.

Further appeal from the decree of F. P. Beachcroft Esquire, Divisional Judge, Jhelum, dated 5th March 1891.

Oertel, for appellants.

Browne, for respondents.

The main question for consideration in this appeal was whether by the custom of Kalwal Jats (Muhammadans) of the

Gujrat District, the adoption of a person of a *ghair qaum*, such as a wife's brother's son, was valid.

The judgment of the Chief Court was delivered by

RIVAZ, J.—The question is as to the validity of the adoption of a wife's brother's son by a childless proprietor among Kalwal Jats (Muhammadans) of the Kharian tahsil of the Gujrat District. Both Courts agree in finding the facts to be that the first defendant took the second defendant into his house in infancy, brought him up, and married him, and recently (on the 29th March 1890) executed and registered a deed of gift in his favour, in which the donor recited that he had always treated the donee as a son. But the Courts have differed as to the validity of the gift. Viewed as a gift only and apart from any question of adoption, it seems clear that the alienation cannot be upheld. The real question is whether the proved treatment of the second defendant as a son, coupled with the declaration contained in the deed, is sufficient to constitute the donee a validly appointed heir. This depends upon whether the custom of the tribe to which the parties belong recognises the adoption of a *ghair qaum*, such as a wife's brother's son, and the onus of proving such custom lay, we consider, upon the defendants. Section 17 of the *Rivaj-i-am* recognises no power of adoption at all among Muhammadan Jats of this district, and the power of gift is also strictly limited (*vide* Section 21). Civil Judgment No. 15, *Punjab Record*, 1880, is against the validity of an adoption such as that now set up, and we are not satisfied that No. 104, *Punjab Record*, 1891, which is relied upon by the defendants, should be held applicable to the present case. We think that the defendants have failed to discharge the onus of proving that the deed impugned is valid by custom, and we, therefore, accept this appeal and restore the first Court's decree with all subsequent costs.

5th May 1892.

Appeal allowed.

No. 82.

BURA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

MAN SINGH,—(PLAINTIFF),—RESPONDENT.

Case No. 1262 of 1890.

(STOGDON & BULLOCK, JJ.)

Custom—Gift to grandsons to exclusion of son—Sidhu Jats, tahsil Moga, Ferozepore District.

Found in a suit, the parties to which were Sidhu Jats of the Moga tahsil of the Ferozepore District, that no custom was established

} APPELLATE SIDE.

empowering an owner of ancestral property to make a gift of half of his land and a house to his grandsons—the children of his only son, who had two wives, by each of whom he had male issue, the donees being the children of one of the wives—to the exclusion of their father, the donor's son.

Further appeal from the decree of Colonel H. J. Lawrence, Divisional Judge, Ferozepore, dated 15th July 1890.

Oertel, for appellants.

Shircore, for respondent.

The question for determination in this appeal was whether any custom was proved authorising an owner of ancestral property to make a gift of half of his land and a house to his grandsons—the sons of his only son, who had two wives, by each of whom he had male issue—to the exclusion of their father the donor's son. The donees were the donor's grandsons by one of his son's wives.

The parties were Sidhu Jats of tahsil Moga, Ferozepore District.

The judgment of the Chief Court, finding the custom not established, was delivered by

9th May 1892.

BULLOCK, J.—The parties to this suit are Sidhu Jats of the Moga tahsil in the Ferozepore District. The plaintiff is the only son of Charat Singh and has two wives, by each of whom he has male issue. Charat Singh has recently conveyed half of his lands and a house by gift to the sons of one of the plaintiff's wives, thus excluding their father from the succession to that extent, and this latter sues to establish the invalidity of the gift.

We find that the property is ancestral, and it has not been shown what rule regulates succession in this family among the sons of different mothers. Man Singh may have further issue, and under certain circumstances the distribution made by Charat Singh might prove to be inequitable so far as the sons are concerned, the ostensible reason for the gift, viz., that it was to prevent the possibility of unfair favouritism on the part of the plaintiff, loses all force under the circumstances.

The gift is an unusual one, and we think the principle laid down in *Punjab Record*, No. 164 of 1884, applies with much force to the present case. The defendant must show by clear evidence that Charat Singh was competent to make the gift without the consent of Man Singh. No instance has been shown us in which an alienation of this kind has been allowed

a similar transfer was successfully resisted among persons in another part of this district.

The defendants fail to show any ground on which this gift can be supported, and we therefore dismiss their appeal with costs.

Appeal dismissed.

No. 83.

**MUTSADA SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,**

Versus

**DEVI DITTA AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.**

} APPELLATE SIDE.

Case No. 1295 of 1889.

(BENTON & RIVAZ, JJ.)

Custom—Jats of Jaj gôt, Hoshiarpur tahsil—Gift to or adoption of step-son of another gôt.

Found, in a suit the parties to which were Jats of the Jaj gôt in the Hoshiarpur tahsil (the alleged donee or adopted son being however of a different gôt), that no custom was proved authorising a gift of ancestral land to a step-son in the presence of near collaterals, or the adoption of such son by his step-father, the burden of proof in either case being upon those seeking to maintain the gift or adoption.

Further appeal from the decree of B. W. Trafford Esquire, Divisional Judge, Hoshiarpur, dated 12th August 1889.

P. C. Chatterjee, for appellants.

Lakhshmi Narain, for respondents.

The parties to this suit were Jats of the Jaj gôt in the Hoshiarpur tahsil, the alleged adopted son or donee being, however, of a different gôt.

The question for determination was as to the validity by custom of a gift to a step-son in the presence of near collaterals, or the adoption of such son by his step-father.

The judgment of the Chief Court, finding the alleged custom not established, was delivered by

BENTON, J.—The suit is brought by a brother, nephews and grand-nephews to have it declared that a gift made by the defendant, Mutsada Singh, in favour of his step-son, Gurdit Singh, shall not affect the plaintiffs' reversionary rights. The deed of gift contained an express statement that Gurdit

Singh, now thirty-five years of age, had been brought up from childhood by the donor, supported, married and treated as a son, and that he was appointed by it sole heir, representative and adopted son. The donor is a man of about the age of sixty. The parties, save Gurdit Singh, belong to the Jaj gôt of Jats of the Hoshiarpur tahsil. Gurdit Singh belongs to a different gôt.

The defendants have two defences available: one that Mutsada Singh was in any case competent to make the gift, and the other that Gurdit Singh was validly adopted, in which latter case the plaintiffs would have no *locus standi*. These matters have been the subject of an exhaustive inquiry, in accordance with an order passed in chambers in this Court remanding the case for this purpose. The inquiry was made by a Commissioner for local inquiry. We have the opinion of the Commissioner, a Revenue Extra Assistant Commissioner, given in great detail, in support of the validity both of the gift and the adoption. We have on the other side the opinion both of the District Judge and the Divisional Judge, after detailed examination of the inquiry, adverse to the defendants on both points.

The plaintiffs' suit had been decreed by the concurrent judgments of both Courts. We have heard the learned pleader who appeared for the appellants in this Court; on his case as it is left by the further inquiry, we did not find it necessary to call on the respondents to reply.

The adoption was open to various objections set forth in the order of this Court ordering the further inquiry, as, for example, that the adoption rested on the deed alone unsupported by any ceremony; that the adoptive father was in old age; that the alleged adopted son was of middle age; and that he was a stranger or of a different gôt. Some of these objections may not be very serious, and we do not propose to discuss them, with the exception of the last which appears to be unsurmountable.

The *Wajib-ul-arz* has nothing special with regard to adoption, but it is of a very restrictive and exclusive character as regards alienation.

The *Riwaj-i-am* treats the subject of adoption with great fullness and lays down that the only persons of a different gôt who may be adopted are sister's sons and daughter's sons.

The learned pleader for the appellants contended that the defendant, Gurdit Singh, being a step-son was in itself no disqualification, but rather something in his favour, and we may allow this assertion to pass without contradiction. The further contention, however, that it was for the defendants to prove the invalidity of the adoption of a step-son of a different gôt is one which we are unable to accept, although authority might be quoted in support of it in cases decided a good many years ago. The subject is specially discussed in *Punjab Record*, No. 156 of 1890, in which case the person claiming to be adopted was a wife's brother's son, and we approve of the conclusion therein arrived at, that the burden of proving the validity of such an adoption is on those who assert it, and we follow the ruling and the authorities cited.

The defendants' case on this head we find is supported by one instance, which is open to no objection; by another, which may yet be disputed and disallowed; and by two, in which it is doubtful whether the adopted son was of the same or of a different gôt. These instances are altogether insufficient to establish a custom permitting the adoption of a person of a different gôt, if we had no reliable record of custom, as we have in the present case, and they are all the more inadequate when they are opposed to it.

As regards the gift, the *Wajib-ul-arz*, as we have said, is of a very exclusive and restrictive character, and in the present case no special circumstances are adduced which should induce us to regard the alienation as valid as being justified by necessity of any sort.

The result is that the appeal must fail, and is accordingly dismissed with costs.

Appeal dismissed.

No. 84.

JOWAHIR SINGH AND PURAN SINGH,—(PLAINTIFFS),—
APPELLANTS.

Versus

SARDAR MAN SINGH & ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1465 of 1890.

(BENTON & RIVAZ, JJ.)

Small cause—Suit for share of offerings received for a specified period.

A suit for a certain share of offerings received at a shrine for a certain period, the plaintiffs claiming as rightful successors to the former

incumbent, the defendants being, one, the Manager of the Golden Temple, who held the money in dispute in safe custody only, and the other defendant a rival claimant, who set up a title as donee, is a "small cause."

*Further appeal from the decree of C. P. Bird Esquire,
Divisional Judge, Amritsar, dated 5th November, 1890.*

Krishna Singh, for appellants.

Lal Chand, for respondents.

This appeal raised the preliminary question as to whether the suit was a "small cause" and liable to be dealt with as such.

The facts sufficiently appear from the judgment of the Chief Court which was delivered by

27th April 1892.

BENTON, J.—This appeal was instituted on a certificate granted by the Divisional Judge. It is a suit for a certain share of offerings received at the Baba Attal shrine in Amritsar for a certain period, the plaintiffs claiming as rightful successors to Dharm Singh, the former incumbent. The shrine in question is separate from, but adjacent to, the Golden Temple, and it has some connection with it. The defendants are Sardar Man Singh Manager of the Golden Temple, who has got the share of the offerings in dispute committed to his safe keeping, and a rival claimant, who claims as donee from Dharm Singh.

Before proceeding to hear the case, we called on the parties to satisfy us that the suit is not a small cause. The case reported as *Punjab Record* No. 188 of 1888, was a very similar case. It was considered to be a suit on the ordinary count for "money had and received." That case was decided under Act XI of 1865, and the Court expressly refrained from expressing any opinion as to the effect of Article 13, Schedule II of the later Act of 1887. The case reported as *Punjab Record*, No. 81 of 1889, is a somewhat similar case, being a suit by a co-sharer in birt dues to recover his proper share from his co-sharers. It was held in that case that the Article above referred to was limited to a suit against the person by whom the dues were payable, or his legal representative, and this ruling was followed in a case very similar to the present, reported in the note to the report just referred to. That was a suit between the Pujaris of a shrine, or persons who claimed to be such, in respect of the offerings collected at a certain fair. The Article would appear to be distinctly less applicable to the present case, as the principal defendant is admittedly a mere

stakeholder who has got the subject matter in dispute in his keeping.

Neither side seriously disputed that the suit was a small cause. We proposed to set aside the decree of the Divisional Judge, as the appeal in a small cause lies to the District Judge, and to request him to return the appeal for presentation to the District Judge, but as the case occurred within the jurisdiction of a Small Cause Court, the only course open to us is to set aside the proceedings in the Courts below and to direct the plaint to be returned for presentation in the Small Cause Court. We order accordingly, and we allow the respondent his costs in this Court, and order the parties to pay their own costs in the other Courts as the objection was not taken in those Courts.

Appeal allowed.

Full Bench.

No. 85.

SAIN DITTA,—(PLAINTIFF,)—APPELLANT,

Versus

GHULAMAN,—(DEFENDANT,)—RESPONDENT.

} APPELLATE SIDE.

Case No. 1517 of 1890.

(FRIZELLE, STODDON AND BULLOCK, JJ.)

Abandonment of land—Extinction of proprietary rights.

Held, by the Full Bench, that an owner of land who has abandoned it within twelve years previously to the institution by him of a suit for possession thereof, does not by such mere act of abandonment lose his proprietary rights. His title will prevail, provided that it has not been extinguished by the operation of the law of limitation.

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 24th October 1890.

Ishwar Das, for appellant.

Bates, for respondent.

This was a reference to a Full Bench to consider the question whether an owner of land who leaves his village with the intention of abandoning his land, loses his proprietary rights therein, such abandonment taking place within twelve years immediately preceding the institution of the suit and not having been made in favour of any particular person.

The order of reference was as follows—

9th May 1892.

STODON, J. (BULLOCK, J., concurring).—We have little doubt that Man Das, the proprietor of the land in dispute, relinquished possession of it and left the village with the intention of abandoning it; but we concur with the Divisional Judge in holding that the relinquishment of possession took place less than twelve years previously to the institution of the suit. The Settlement Record, which was prepared not earlier than 1879, shows that Man Das was in possession of the land at that time, and the *jamabandi* of Sambat 1944 shows that he absconded about Sambat 1938, or ten or eleven years ago. Moreover, two cases in which plaintiff, in his capacity of lambardar, applied for the issue of warrants against Man Das and other defaulters show that Man Das was present in the village in 1878 and in 1879. Whether, therefore, the period limited to Man Das or his representative for instituting a suit for possession of the land is prescribed by Article 142 or 144 of the Limitation Act, it had not determined at the time of the institution of this suit, and his right to the property had not been extinguished under the provisions of Section 28 of the Limitation Act. Lala Ishwar Das, however, argues that abandonment can take place altogether irrespective of time, and that Man Das lost his title to the land by abandoning it, and he relies upon a decision of this Bench in Civil Appeal No. 1069 of 1890 in support of his contention. I was a party to the decision in question, but on reflection I am inclined to think that it cannot be supported. I would, therefore, propose that the question be referred to a Full Bench, whether Man Das by abandoning his land lost his proprietary right in it, the abandonment having taken place within the twelve years immediately preceding the institution of the suit and not having been in favour of any specific person.

The opinions of the Full Bench were delivered as follows—

31st May 1892.

STODON, J.—Before answering the question referred to the Full Bench, I think it is necessary to arrive at some notion of what is meant by the term “abandonment.” It is defined in *Pollock and Wright's Essay on Possession* as the case of a person quitting possession without any specific intention of putting another person in his place (page 44). The meaning of the word as applied in this Province to absentee cases is an intentional quitting of possession by the proprietor, coupled with an intention not to resume it. In my opinion, there is no practical difference between the two definitions, and I do not

think a quitting of possession is possible unless there is an intention on the part of the person in possession to divest himself entirely of the thing possessed. If a divestitive intention does not exist, there is no absolute quitting or relinquishment of possession. The nature of the possession may be changed. The possessor may lose physical control or *de facto* possession, but he may still have either legal or constructive possession. An owner of land, for instance, may part with physical control over it and go on a journey of several years' duration, but unless he has manifested an intention of relinquishing possession he will still be the possessor in the eye of the law. Of course his possession might be terminated by any one taking possession of his land during his absence, but we are only concerned with cases of termination of possession by the act or conduct of the possessor. According to Savigny, to enable possession to continue, there must be a corporeal relation and animus, and if either one or the other, or both together, cease, the possession is lost. Corporeal relation ceases when there is an utter impossibility of dealing with the subject. Animus ceases when there is an express determination not to be the possessor (*Von Savigny on Possession*, translated by Perry, 246.) From the possessor's point of view, corporeal relation exists as long as the *animus possidendi* exists, and there can be no real intention to discontinue possession as long as an intention exists that the abandonment of physical control shall be only temporary and not permanent. I therefore consider that all such terms as "abandonment," "relinquishment" and "discontinuance" of possession involve an intention not to resume possession, and that an owner of land who relinquishes possession of it intends to divest himself of his proprietary right therein, just as much as does a person who throws away some worthless article of personal property. If this view is correct, a person who abandons his land with the intention of never reclaiming it, has twelve years under Article 142 of the Limitation Act within which he can change his mind. That Article prescribes a limitation of twelve years for a suit for possession of immoveable property when the plaintiff, while in possession, has discontinued the possession, such period to run from the date of discontinuance, that is from the date on which the plaintiff severed his corporeal relation with the property by the exercise of his will.

If this view is not correct, I can still find no authority for holding that an owner of land in the Punjab divests himself of his ownership by a mere act of abandonment, coupled with

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an intention to renounce his ownership. According to the Roman Law, an owner lost his rights by abandonment. In the *Institutes of Justinian*, Lib. 11, Tit. 1—47, it is stated that anything is considered abandoned which its owner has thrown away with a wish no longer to have it as part of his property, as it therefore immediately ceases to belong to him; and Sir Henry Maine in his *Treatise on Ancient Law* mentions lands which have been deserted as things which in Roman law have not an owner (3rd edition, 245). By English law, ownership in moveables is lost by abandonment, but I cannot find that the same rule has ever been held to apply to immoveable property. Probably the question never had any practical interest, because land is valuable in England, and a person possessed of ordinary intelligence does not usually abandon valuable property. A consideration, however, of the laws of other countries on the subject is not necessary.

There is no doubt that by the custom of the Punjab a proprietor does not lose his proprietary rights by mere abandonment of his land.

A case of abandonment is not one of the nature described in Section 5 of the Punjab Laws Act, but Section 6 enacts that in cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience, and Section 7 validates all local customs which are not contrary to justice, equity or good conscience, or which have not been declared by any competent authority to be void. The older settlement records of the Province teem with acknowledgments made either by the proprietary bodies of villages, or by individual members of them, of the rights of absentees to resume possession of their lands on payment of losses.

In *Rattigan and Boulnois' Customary Law*, second edition 222, it is stated that the willingness of village co-sharers to recognize the right of an absent proprietor is characteristic of the village system, and extracts from standard works and from reports of experienced officials are quoted in support of this statement. Probably there was no limit to the time within which an absentee proprietor could resume his land. According to Elphinstone (*History of India*, Chapter II), he was entitled to claim it for three generations, or one hundred years, if from any change of circumstances he should feel so disposed. The ownership of land was more burdensome than profitable, and the return of an absentee was probably

hailed with delight as tending to relieve the other co-sharers of some portion of their burden. Now, with a settled revenue and a strong administration, the value of land has much increased and a feeling adverse to the claims of absentees of long standing is growing up. This is probably sufficiently provided for by the law of limitation, which cannot be overridden by custom ; and while in former times an absentee could resume his land at any time, he will now only be allowed to do so, provided that his claim is not barred by limitation and that his proprietary right has not been extinguished by the effect of that law. If, however, his claim is not barred by limitation, there is nothing in law or custom to prevent him from recovering his land. On the contrary, custom is strongly in his favour, and such custom appears to be an equitable one. Of course he might lose his rights by any act tantamount to an alienation of them or which would operate as an estoppel.

For the above reasons, I would reply that Man Das by abandoning his land did not lose his proprietary right in it,—the abandonment having taken place within the twelve years immediately preceding the institution of the suit and not having been in favour of any specific person. The last paragraph of the question appears to be superfluous, because the term “abandonment” implies that the quitting of possession has not been in favour of any specific person.

FRIZELLE, J.—I think a man may discontinue his possession of land even when he does not intend to entirely abandon the land. He may leave it and go away without putting any one in possession on his behalf, but intending at some future time to return and resume it, and in that case I think he may be said to have “discontinued possession.” To this extent, I do not quite agree with the view expressed by Mr. Justice Stogdon. But I agree with him in holding that when a proprietor entirely abandons his land, that is, relinquishes possession without any intention of ever resuming it, he is not barred by the mere fact of having abandoned the land from claiming within twelve years to recover it from whoever may have taken possession of it. He may be barred for other reasons, but not by abandonment alone.

1st June 1892.

I therefore concur in the proposed answer to the reference, namely, that Man Das by merely abandoning his land has not lost his proprietary right in it.

BULLOCK, J.—Man Das was an owner of land, and being 2nd June 1892, unable to pay the revenue due on it, he left his village less than

twelve years before this suit, ownership. According to the law, it went away without any intention of rights by abandonment. In his land, and it is also found that *Til.* 1-47, it is stated to his intention, but had merely gone, which its owner has any arrangements with regard to the land, it as part of his Man Das' departure, Sain Ditta took possession along to him; question now before us is whether Man Das' discontinuance of possession *ipso facto* extinguished his rights in the Roman law, that a stranger taking possession acquired a good title by law, him at once.

In the case which gave occasion to this reference, it appears to have been held that at the moment when a man turns back on his land without a present and definitely formed intention of returning, he abandons it and loses his title: this decision leaves him no *locus penitentiae* but extinguishes his rights at once. It is no doubt true that an owner may so conduct himself that by an act of his own will he may relinquish his intention of continuing his ownership; but this relinquishment is a question of fact, and, if time be no element in the question, it is difficult to see how the inference can arise. It must arise from his conduct; but unless his conduct be such as to constitute a bar to the assertion of his rights in the nature of an estoppel, the mere discontinuance of possession cannot operate to the detriment of the title until a consequence attaches to it by law, owing to the lapse of a certain time. In the absence then of anything that estops the owner, his title does not determine within the period of limitation prescribed by law for its extinguishment. Our answer to the question referred should, therefore, be that, under the circumstances stated, Man Das did not lose his proprietary right.

The final judgment of the Court was delivered by to
 18th July 1899. RIVAZ, J. (BULLOCK, J., concurring).—The opinion of the Full Bench is in accordance with the views expressed by the Divisional Judge.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

No. 86.

MUHAMMAD KHAN,—(PLAINTIFF),—

APPELLANT,

Versus

JAHAN LAL,—(DEFENDANT),—RESPONDENT.

Case No. 438 of 1892.

(FRIZELLE & RIVAZ, JJ.)

} APPELLATE SIDE.

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The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisional Court under Section 39, Punjab Courts Act (as amended).

Suit for account—Value of relief sought—Jurisdiction—Course of appeal
authority of appellate Court disclaiming jurisdiction to order payment
additional Court Fee.

The plaintiff sued the defendant for an account valuing the relief sought at Rs. 100, and expressing his willingness to pay the Court fee upon any sum decreed in excess of this amount, in accordance with the provisions of Section 11, Court Fees Act, 1870.

after the defendant had produced the books containing the parties' assets and a commission had examined the same, the plaintiff filed a statement stating that he appeared to be *prima facie* entitled to recover a sum of Rs. 12,000-0-0, and praying that the matter might be fully investigated. The amendment of the plaint was, however, either asked for or ordered, and the suit eventually resulted in a decree in the plaintiff's favour for Rs. 13.

The plaintiff then appealed for a further sum of Rs. 1,716 and the defendant, against the decree in the plaintiff's favour, for Rs. 2,343.

Both parties presented their appeals to the Divisional Judge, who held that the appeals lay to the Chief Court.

It was held, that the appeals lay to the Divisional Judge: under Section 7, (iv) of the Court Fees Act, the valuation of the original suit for purposes of Court fee is fixed at the amount at which the relief sought is stated in the plaint. This, in the present case, was Rs. 100 and the amount was never altered by any amendment of the plaint: and under Section 8, Suits Valuation Act, 1887, the value of a suit for an account as stated in the plaint is determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same.

The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisional Court under Section 39, Punjab Courts Act (as amended).

Semle.—If an appellate Court has no jurisdiction to hear an appeal, it is not competent to it to pass orders for the payment of any additional Court fee which it considers should have been levied in the first Court.

[Cf. Punjab Record, No. 40 of 1892].

First appeal from the decree of Sardar Sultan Jan, C.I.E., Subordinate Judge, Kohat, dated 22nd December 1891.

Piari Lal, for appellant.

The principal question for determination in this case was whether the appeal lay to the Divisional or to the Chief Court.

The facts sufficiently appear from the judgment of the Chief Court which was delivered by

1st June 1892.

RIVAZ J.—In our opinion the Divisional Judge was wrong in refusing to entertain this appeal by the plaintiff and the cross appeal filed by the defendant.

Both appeals arise out of a suit for an account, in which the plaintiff in his plaint valued the relief sought at Rs. 100, expressing his willingness to pay the fees due upon any sum decreed in excess of the amount above stated in accordance with the provisions of Section 11 of the Court Fees Act. It appears that after the defendant had produced the books containing the parties' accounts and a commission had examined the same, the plaintiff put in a petition stating that he appeared to be *prima facie* entitled to recover a sum over Rs. 12,000, and he prayed that the matter might be fully investigated. No amendment, however, of the plaint was either asked for, or ordered, and the suit eventually resulted in a decree in plaintiff's favour for Rs. 2,343. Plaintiff is now appealing for an additional sum of Rs. 1,716 and defendant against the decree in plaintiff's favour for Rs. 2,343.

The appeals were presented in the Divisional Court. The Divisional Judge first ordered that plaintiff should make up the Court fees filed in the first Court to the amount which would be necessary for a claim for Rs. 12,000, and after this had been done refused to hear the appeal on the ground that the value of the subject-matter of the suit was in excess of Rs. 5,000, and that the appeals therefore lay to this Court.

We cannot refrain from remarking that we consider the order requiring plaintiff to file Court fees for the first Court assessed upon Rs. 12,000 was not warranted by law. Moreover, even if the order was a proper one, we fail to see how the Divisional Judge could pass such an order, if (as he eventually decided) he had no jurisdiction to hear the appeals. We do not think that Section 12 (ii) of the Court Fees Act empowers a Court of appeal to which an appeal has been wrongly presented to pass orders for the payment of the additional fee therein alluded to. But be this as it may, we are clearly of opinion that the Divisional Judge had jurisdiction to hear and dispose of the appeals. Under Section 7, clause iv

of the Court Fees Act, the valuation of the original suit for purposes of Court fees is fixed at the amount at which the relief sought is valued in the plaint. This in the present case was Rs. 100, and the amount was never altered by any amendment of the plaint. Section 11 of the Act contains a provision which secures the full amount due upon the sum decreed being eventually recoverable, so that loss will not result to the revenue. Under Section 8 of the Suits Valuation Act, the value of a suit for an account as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same. Therefore, the value of the present suit for purposes of jurisdiction is Rs. 100, and the appeal lies to the Divisional Court under Section 39, clause (c) of the Punjab Courts Act.

Both appeals must be returned for representation to the Divisional Judge, who is hereby directed to entertain and dispose of the same.

Appeals returned.

No. 87.

MUHAMMAD UMAR,—(PLAINTIFF),—PETITIONER,

Versus

RAM CHAND,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 381 of 1892.

(RIVAZ, J.)

Right to sue—Habitual worshipper at mosque—Ejectment of trespasser.

In a suit by one who was an habitual worshipper at a certain Muhammadan mosque, of which he was also a neighbour and a supporter or well-wisher, for the ejectment of the defendant from certain land alleged to be attached to the mosque and to have been unlawfully encroached upon, the Divisional Judge dismissed the plaintiff's suit holding that he was not competent to maintain it.

Held, that the suit would lie. Every Muhammadan who has a right to use a mosque is competent to maintain a suit against any one who interferes with the exercise of his such right to use: and by the same analogy every Muhammadan has a right to maintain a suit against persons who commit an injury upon property which has been devoted to the support of a mosque.

Petition under Section 40, sub-section (2), Punjab Courts Act, for revision of the decree of T. Troward Esquire, Divisional Judge, Dehli, dated 8th January 1892.

Turner, for petitioner.

Madan Gopal, for respondent.

The only question for consideration in this case was whether the plaintiff, who was a habitual worshipper at a Muhammadan mosque, could maintain a suit for ejectment of defendant from certain land said to be attached to the mosque and to have been unlawfully encroached upon by defendant.

The facts sufficiently appear from the judgment.

20th June 1892.

RIVAZ, J.—Revision has been applied for in this case, upon the allegation that the Divisional Judge of Delhi has failed to exercise a jurisdiction vested in him by law, inasmuch as he has declined on appeal to adjudicate upon the merits of the case before him, but has dismissed the plaintiff's suit upon a finding that he is not competent to maintain it. I think, upon the authority of Civil Judgment No. 75, *Punjab Record* of 1890, that the point urged is an admissible ground for revision under Section 622, Civil Procedure Code, and no objection on this score was taken by the learned counsel for the respondent.

The short question in the case is, whether plaintiff as an habitual worshipper at a certain Muhammadan mosque, of which he is moreover a neighbour and a supporter or well-wisher, can maintain a suit for the ejectment of defendant from certain land said to be attached to the mosque and to have been unlawfully encroached upon by defendant. The latter is the owner of certain premises near the mosque, and the property in dispute lies between defendant's house and the mosque.

I think that I must hold upon the authorities that the suit lies. Civil Judgment No. 94 *Punjab Record* of 1885 appears to me to be in point; and it was there ruled that a suit to set aside an alienation of property alleged to belong to a Muhammadan shrine was maintainable by two plaintiffs claiming to be interested in the maintenance of the shrine, but not to be directly interested in the property. The interest alleged was held sufficient to enable the plaintiffs to sue, and it was further held that Section 539, Civil Procedure Code, had no application to the suit. Several authorities (notably the Full Bench decision in I. L. R., 7, All., 178) were cited in

support of the above view, and two decisions of the Calcutta High Court, which were in conflict, were not approved. Mr. Madan Gopal contended that the authority of the Allahabad decision was shaken by the recent ruling of the same Court reported in I. L. R., 11 All., 18. But it appears to me that the later case is clearly distinguishable, and was in fact distinguished from the earlier ruling. The position of a worshipper at a Hindu temple is not necessarily analogous to that of a worshipper at a Muhammadan mosque. There is said in the case last cited to be no provision of Hindu law dealing with the question, whereas the rule of Muhammadan law has been stated to be that "every Muhammadan who derives any benefit from an admitted *waqf* is entitled to maintain an action against the *matwalli*, to establish his right thereto, or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, without joining any other person who may participate with him in the benefit." (*Tagore Law Lectures*, 1884, 429). It was further contended for the respondent that the general effect of all the rulings was to show that the test of the plaintiff's right to sue, in cases like the present, was whether he alleged an act upon defendant's part which definitely interfered with his right of worship; and that it was not sufficient to allege a mere interference with property belonging to the religious institution, for example, land outside the mosque itself, which might reasonably be left to be protected by the officials in charge of the mosque. I cannot find any sufficient grounds, after a perusal of the cases cited, for maintaining this distinction. In the most recent case which I have been able to discover, *Muhammad Umar, v. Maula Bakhsh* (Weekly Notes, All. 1892, 9) the Court observed:—"It has been held by the Full Bench of this Court that in the case of mosques every Muhammadan who has a right to use the mosque is competent to maintain a suit against any one who interferes with the exercise of his such right to use. By the same analogy, I am of opinion that every Muhammadan has a right to maintain a suit against persons who commit an injury upon property which has * * * been devoted to the support of a mosque." In the above view I concur. I would add that in my opinion Section 30 of the Civil Procedure Code has no necessary application to the present question, as the allegation is that an individual right has been violated; not that there are numerous parties jointly interested in obtaining relief.

One further point deserves notice. The Divisional Judge with a view to a better consideration of the question of the plaintiff's *locus standi* first proceeded to decide what relief the plaintiff would appear to be entitled to if he could establish his right to sue. The Divisional Judge is inclined to the opinion that defendant, if a trespasser, encroached and built upon the land in suit under a *bona fide* belief that it formed part of his property: that therefore his buildings could not be removed without payment of compensation, and he proceeds:—"This case involves the same principle as numerous reported decisions by the Chief Court, where the owners of land have kept silent and allowed the erection of buildings on their property by trespassers, in which it has been ruled that the proper course is to allow the building to stand, subject to a payment by its owner to the proprietor of the land, of compensation for the site or of a fixed ground-rent When we come to apply this relief," continues the Divisional Judge, "we discover the flaw in the plaintiff's position." I confess that I do not feel much pressed by the above argument. The rulings of this Court (of which the most recent and important are Civil judgments Nos. 38, *Punjab Record* of 1889 and 53, *Punjab Record* of 1878) show that no such general and universal rule can be laid down as that enunciated by the Divisional Judge. The decision in each case must depend upon the particular circumstances of that case, and at least one recognized mode of settling the dispute is to compel the owner of the soil to take over the defendant's buildings at a valuation, a method of decision which, if it were applied to the present case, would perhaps afford a not inappropriate test of the disinterested character of the present plaintiff's motives in moving in the present action.

Holding for the reasons already stated that the plaintiff can maintain the present suit, I accept this application and setting aside the Divisional Judge's order direct him to restore the defendant's appeal to his file, and dispose of it upon the merits.

The stamp filed with the application to this Court will be refunded and other costs will be costs in the cause.

Rule absolute: cause remanded.

No. 88.

AHMAD KHAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

BAHADUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1310 of 1891.

(RIVAZ, J.)

Jurisdiction of Civil Court—Section 158 (2) (xvii) Land Revenue Act, 1887—Allegation of error in partition proceedings.

The plaintiffs sued for a declaration that they were owners of certain land contained in three specified *khasra* numbers of which they alleged that they were in possession under a partition made by the Revenue authorities in 1884.

The final record of the partition showed that the land fell to the defendant's share, but this it was alleged was owing to an error in the preparation of the final papers.

Held, that the suit distinctly raised a question connected with, or arising out of, proceedings for partition within the meaning of Section 158 sub-section (2) (xvii), Punjab Land Revenue Act, 1887, * and that the question was not one "as to title in any of the property of which partition is sought" within the same clause, and that the jurisdiction of the Civil Courts was ousted.

Further appeal from the decree of J. A. Anderson Esquire, Divisional Judge, Rawalpindi, dated 6th August 1891.

Ishwar Das, for appellants.

Sarbadhicary, for respondents.

The question for determination in this appeal was whether the jurisdiction of the Civil Courts was barred by reason of the provisions of Section 158, sub-section (2) (xvii), Punjab Land Revenue Act, 1887.

The facts are given in the judgment.

RIVAZ, J.—In my opinion the Civil Courts had no jurisdiction to hear this case. 13th June 1892.

The claim is for a declaration that plaintiffs are owners of certain land, contained in three specified *khasra* Nos. (1122, 1123, 1124,) of which they allege that they are in possession under a partition made by the Revenue authorities in 1884. The final record of the partition shows the land as² having

* Any claim for partition of an estate, holding or tenancy, or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought.

fallen to defendants' share, but the allegation is that this is owing to an error in the preparation of the final papers. It appears to me that the plaintiff's suit distinctly raises a question connected with, or arising out of, proceedings for partition within the meaning of clause (xvii), sub-section (2), Section 158 of the Land Revenue Act of 1887, and that the question is not one "as to title in any of the property of which partition is sought" within the same clause. The suit challenges the correctness of a record of a partition made by a Revenue Officer, and asks for a declaration of title opposed to that record. I think that the plaintiff's remedy (if any) is in the Revenue Court, but it appears to me doubtful whether a regular suit will lie even in that Court, and I am not disposed therefore either to take action under Section 100 of the Tenancy Act, or to direct the return of the plaint.

I think the proper order to pass is one accepting the plaintiffs' appeal, so far as to direct that the plaintiffs' suit stand dismissed on the sole ground that the Civil Courts have no jurisdiction to entertain it, and I order accordingly.

No objection was taken to the jurisdiction of the Civil Court in either of the Courts below, and I therefore direct that each party do pay his own costs throughout.

Appeal allowed.

No. 89.

APPELLATE SIDE. { MUSSAMMAT RAKHI,—(PLAINTIFF),—APPELLANT,—
Versus
MUSSAMMAT FATIMA AND OTHERS,—(DEFENDANTS),
—RESPONDENTS.

Case No. 541 of 1890.

(STODDON & BULLOCK, JJ.)

Custom—Alienation—Right of near female collateral—Kanwali Arains of Lahore District—Meaning of aulad.

Found, in a suit the parties to which were Kanwali Arains of the Lahore District, that by custom a near female collateral was not competent to object to a sale of land and houses by the deceased owner's widow.

Observations as to the meaning of the term *aulad*.

Further appeal from the decree of Colonel H. M. M. Wood, Divisional Judge, Lahore, dated 14th February 1890.

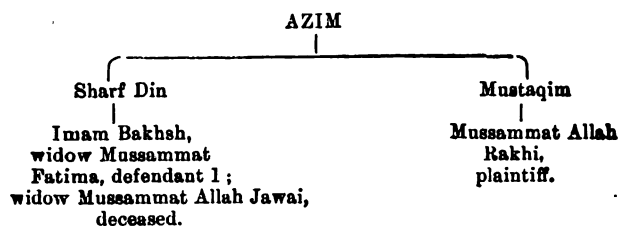
Madan Gopal, for appellant.

P. C. Chatterjee, for respondents.

This appeal raised the question as to the right of a near female collateral to object to an alienation by the deceased owner's widow.

The parties were Kanwali Arains of the Lahore District. The facts sufficiently appear from the judgment of the Chief Court which was delivered by

STODDON, J.—The parties are Kanwali Arains of the Lahore 22nd June 1892. District. The following table shows the relationship existing between plaintiff and defendant 1 :



The land and houses in dispute belonged to Imam Bakhsh. On the 10th March 1888, his widow, Mussammat Fatima, sold them to Imam Bakhsh. Mussammat Allah Rakhi sued both vendor and vendee for a declaration that the sale would not affect her reversionary rights.

It was pleaded among other things that defendant 1 was absolute owner of the property, and that plaintiff was not entitled to succeed to it. The first Court passed a decree in plaintiff's favour, which was reversed by the Divisional Judge on the ground that plaintiff had no right as reversioner.

The argument before us has principally had reference to the extensive recognition of the rights of succession of females of the Arain tribe, as evidenced by decisions of this Court such as *Punjab Record*, No. 25 of 1882, and No. 146 of 1889, and by the statements of witnesses, and further to the construction to be put upon certain answers in the *Riwaj-i-am*, the principal of which is Answer No. 126, according to which a widow has the power to make a gift when there are no legal heirs of her husband in existence, and the term "legal heir" (*waris jais*) is stated to include the descendants (*aulad*) of the grandfather of the widow's husband. It is contended for appellant that she comes within this description. She is certainly a descendant of the grandfather of Mussammat Fatima's husband Imam Bakhsh, but it is urged for respondent that the term "*aulad*" is confined to agnates, or, in other words, to males descended through males. The word "*aulad*"

is the plural of the word "*wald*," which is always construed as denoting a son and "*lawald*" means without male issue. The word "*aulad*" has a wider meaning and includes certainly all male lineal descendants. Sometimes it is used with the qualifying adjective "*narina*" or "*male*," but this usage is probably confined to cases in which it is desired to distinguish "*aulad narina*," or male, descendants, from "*aulad dukhtari*," or female descendants. Used by itself, we have no doubt that the word "*aulad*" denotes males related through males, or as they are usually called "collaterals," and we do not consider that plaintiff is entitled to be included among the legal heirs referred to in Answer 126. The District Judge has stated that in any other class, save those like Arains, who recognize the right of the daughter to succeed in the absence of sons, he would have considered the word "*aulad*" to mean male issue, but it is by no means certain that a daughter does succeed where there are near collaterals. The answer to Question 145 of the *Riwaj-i-am* is in her favour, but according to the *Wajib-ul-ars* of first Settlement, a daughter can only succeed by the consent of the collaterals (*shurka*). In our opinion, plaintiff failed to establish her right to sue. We therefore dismiss the appeal with costs.

Appeal dismissed.

No. 90.

APPELLATE SIDE. {	JOWAHIR AND 5 } OTHERS	—(PLAINTIFFS),—APPELLANTS,
	<i>Versus</i>	
	MUSSAMMAT CHANDI } AND 5 OTHERS	—(DEFENDANTS),—RESPONDENTS.

Case No. 307 of 1891.

(STOGDON AND BULLOCK, JJ.)

Custom—Alienation—Ancestral land—Necessity: antecedent debt—Sonless Brahmin, Hoshiarpur District—Burden of proof.

In a suit by the collaterals (brother's sons) of a deceased sonless Brahmin of the Hoshiarpur District to contest a mortgage of land made by him upon the ground of absence of valid necessity for the alienation, *held*:

Per STOGDON, J.—It is incumbent on a sonless proprietor to pay his debts, and if he raises money in order to discharge them, he raises it for a necessary purpose.

What is valid necessity may be another question of custom, some tribes construing the term much more widely than others.

Per BULLOCK, J.—The payment of a debt proved to be in existence and recoverable by law is a sufficient justification for the raising of money to pay it through an alienation of ancestral land by a childless proprietor, but it follows as a sound deduction from the Full Bench Ruling, *Punjab Record*, No. 107 of 1887, that the last creditor lending upon the security of ancestral land must satisfy himself of the necessity for the previous debts for the payment of which the proprietor borrows.

Punjab Record, No. 107 of 1887, referred to.

[OPINION OF FLOWDEN, J., in admitting the appeal, as to the necessity which will justify a valid disposition of his property by a childless proprietor.]

Further appeal from the decrees of F. O. Channing Esquire, Divisional Judge, Hoshiarpur, dated 29th January 1891.

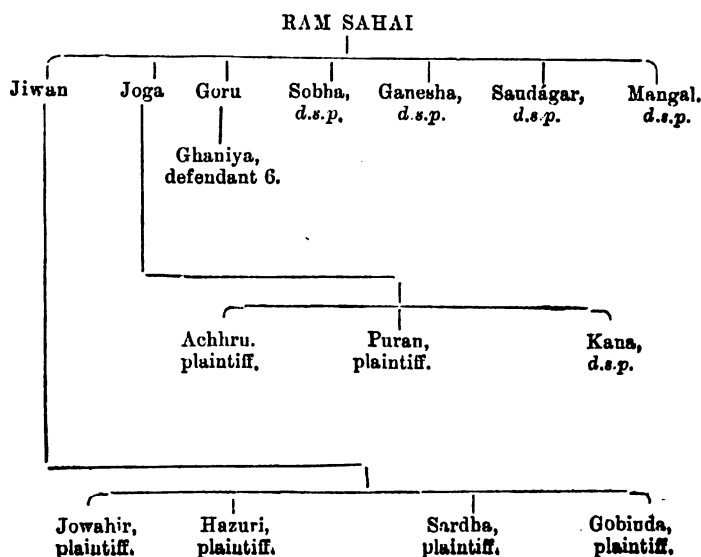
Lal Chand, for appellants.

Turner, for respondents.

This was a suit by the collaterals to contest an alienation (a mortgage) by a sonless Brahmin proprietor of the Hoshiarpur District in which the question of the validity of antecedent debts as constituting sufficient necessity for the alienation was raised.

The facts are given in the judgments.

STODDON, J.—This is a suit in which is contested an alienation by a sonless Brahmin proprietor of the Hoshiarpur District named Mangal, to whom plaintiffs are related as follows:—



On the 10th June 1878, Mangal and Saudagar mortgaged 40 ghumaos 5 kanals 8 marlas of land to Atra and Sukh Dial for Rs. 995, viz., Rs. 49 cash paid before the Sub-Registrar and Rs. 946 paid to Ichhia Dhari, a prior mortgagee. On the 15th June 1884, Mangal borrowed a further sum of Rs. 30 from Phina, Jagiri, Mohan and Lachman, sons of Atra, and on the 28th May 1888, he, Saudagar having died, mortgaged 52 ghumaos 2 kanals 18 marlas to Chuhar, Pohlu, Badhawa, Phulli and Dhuni for Rs. 1,160, composed of the following items:—

To pay to the former mortgagees	...	...	...	1,025
Paid at home	...	...	...	115
Registration expenses...	...	...	...	20
Total Rs.				1,160

Mangal then died. Plaintiffs then sued his mortgagees for possession of the portion of the mortgaged land falling to them as heirs of Saudagar and Mangal, viz., for two-thirds. They made Ghaniya, heir to the remaining third, a co-defendant. They based their claim on the allegation that Mangal had no power to alienate the land without valid necessity, the existence of which was denied by them. As an alternative, they prayed to be allowed to redeem the whole of the land on payment of any sum that might be found to be due to the mortgagees. They further alleged that Mangal succeeded to a portion only of Saudagar's land, and had no power to mortgage portions of it to which they succeeded on Saudagar's death. The mortgagees pleaded among other things that Mangal had full power of alienation and that the mortgage was for necessity. Ghaniya supported them and stated that he and two of the plaintiffs had consented to the alienation.

The first Court found that Mangal had no power to make the mortgage without legal necessity and that such necessity had not been established. It therefore decreed the claim, but its decree was set aside on appeal by the Divisional Judge, who held that, under the circumstances of the case, necessity had been sufficiently established. He therefore dismissed the suit. Plaintiffs appealed to this Court and their appeal was admitted to a Bench by Sir Meredyth Plowden, who recorded the following note:—

"It may be useful, as I have recently heard a doubt suggested as to a childless proprietor being unable to make any valid disposition of his property—that is, binding his collaterals—except for necessity, to point out that even if it be granted that this proposition is true, the question remains: "What is necessity in the case of a childless proprietor?"

"It has been repeatedly pointed out that a childless proprietor and a widow are not on the same footing. A man without sons is as much a proprietor as a man with sons. A widow, as such, is not a proprietor. She has a life-interest with a power, under certain circumstances, of disposition. The childless proprietor is not, like a widow, under any obligation to preserve the property for his successors. An unmarried man of twenty and a sonless widower of eighty are alike childless proprietors. The childless proprietor is, in my opinion, on the same footing as a proprietor with sons when he has near collaterals. They have the same power, and no larger power than sons, to question an alienation made by their father. Now, in this Province, the father has a power of disposition over ancestral property which he can exercise without the consent of his sons and without their joining in the conveyance. There is a distinction between voluntary dispositions and dispositions for cause. A father may not give away ancestral property, or wantonly sell it; but if he is in debt and his creditors sue him, I apprehend the ancestral land can be sold in execution of a decree, whether his sons intervene or not, unless the debt is one not recoverable by law. If that is so, I apprehend he can sell or mortgage to pay his antecedent debt, being a just debt, even if it be not a family debt."

"In the Punjab, at least generally, the Mitakshara doctrine of a son being born with a share is not known, nor has a son a right to compel partition."

"To my mind, the position of sons or collateral heirs in relation to alienation by a father or childless relative is the same as that of sons under the Hindu law, as recently expounded by the Privy Council. The whole interest in the land is in the father or childless proprietor, thus distinguishing them from the widow. The heirs may possibly intervene to prevent a wanton alienation, but when it is a completed fact, is *bonâ fide* for valuable consideration, and not for an immoral

“purpose or to pay an immoral debt, I doubt if they can succeed, except conditionally on payment. I do not lay down these propositions dogmatically, but as my views and as matter for consideration.”

I have transcribed the above note in full because the question, whether the payment of antecedent debts is a valid necessity, has lately been considered by the Court on several occasions and has not been finally settled. In our judgment in Civil Appeal No. 596 of 1890,* Mr. Justice Rivaz and myself ruled that the vendee was sufficiently protected as regards those portions of the consideration money advanced for payment of antecedent debts, if he could show that he satisfied himself, before concluding the sale, that the debts were really due and then proceeded to see that they were duly discharged, and our judgment in Civil Appeal No. 1174 of 1890† proceeded upon the same principle. Other judgments could, however, be found in which it was held that the alienee was bound to satisfy himself of the necessity for the antecedent debts. I am not sure that I am prepared to concur in the whole of the note recorded by the learned Senior Judge, but I feel no difficulty in holding that it is incumbent on a sonless proprietor to pay his debts, and that, if he raises money in order to pay them, he raises it for a very necessary purpose, and that a money-lender would be justified in lending him money on the security of his land in order to enable him to pay them. The question he has to ask himself is, whether he is advancing money for a necessary purpose, and the payment of debts appears to me to be just as necessary as the purchase of seed or oxen, or the celebration of the marriage of a child. It is possible that the money-lender would not be justified in lending money for the payment of debts contracted for immoral purposes, but I confess that I do not see any reason why he should not be justified in doing so.

Cases governed by Hindu law are on a perfectly different footing. As pointed out by the learned Senior Judge, a son is born with a share, and its alienation for the payment of the father's antecedent debts is only justifiable on account of the religious duty imposed upon him of paying such debts. In the Punjab, or at least in the central districts, the presumption is that an alienation of ancestral land by a sonless proprietor is

* Punjab Record, No. 72 of 1892.

† Published as a foot-note to this case.

invalid as against his near collaterals unless it is made for valid necessity.

What is valid necessity may be another question of custom. Some tribes may construe the term much more widely than others, but I cannot conceive a more valid necessity than the payment of lawful debts. The matter may be different when the creditor and the alienee are one and the same person. If a money-lender advances money without any security and for a non-necessary purpose, a subsequent alienation of land to him by his debtor either in payment of, or as security for, payment of his claim would probably be held to be invalid. In both cases the point to be considered would be the necessity for the loan.

For the above reasons, I am of opinion that sufficient necessity existed for the loan of a sum of Rs. 1,025, which is shown to have been borrowed for the necessary purpose of paying off a former mortgage, and I concur with the Divisional Judge in holding that necessity for the other two items of Rs. 115 and Rs. 20 was sufficiently established.

I would further remark that the circumstances of the present case are, in my opinion, of such a nature that it is questionable whether the burden of proving the absence of necessity for the loan was not on plaintiffs. The *Wajib-ul-arz* of 1859 shows that the land of Ganesha, Mangal and Saudagar was at that time mortgaged to Bishna and Ramji for Rs. 233-11-0.

The mortgage to Ichhia Dhari is said to have been effected about 1873 and there is no reason for thinking that plaintiffs were not well aware of it, as well as of the mortgage effected on the 10th June 1878 in order to pay off Ichhia Dhari. In a somewhat similar case (Civil Appeal No. 289 of 1891*), Mr. Justice Benton remarked that though the plaintiffs were within their rights in not suing before limitation compelled them, they must pay the penalty for adopting this course in the necessity for the Court's making all proper allowances for such evidence as had been produced by the other side.

I have little doubt that plaintiffs acquiesced in the mortgages, and that it never occurred to them that they were entitled to contest their validity until the Full Bench Ruling of this Court, *Punjab Record*, No. 107 of 1887, was published. They are not entitled to a decree for redemption, because the mortgage is for a term of five years, which has not yet expired.

* Published as a foot-note to this case.

With regard to the second ground of appeal, I think that the mortgagees having redeemed the mortgage effected by Mangal and Saudagar on the 10th June 1878 are entitled to the benefit of it as against plaintiffs who are not entitled to obtain their share of Saudagar's estate unless they redeem it.

For the above reasons, I would dismiss this appeal with costs.

16th May 1892.

BULLOCK, J.—In 1873 Saudagar and Mangal mortgaged their shares to Ichhia Dhari, and in 1878 again mortgaged to Atra and Sukh Dial for Rs. 995, of which sum Rs. 946 were paid to Ichhia Dhari in redemption of his mortgage. Then, on the 15th of June 1884, Mangal alone created a further charge of Rs. 30 in favour of the mortgagees, and on the 28th of May 1887, Saudagar being then dead, he mortgaged to the defendants for Rs. 1,160 and the mortgagees of 1878 were paid off out of this sum. The sons of Jiwan and Joga now sue the defendants to recover their proper share of two-thirds of the land, and they base their claim upon two grounds : first, that the mortgage by Mangal of the land, or the equity of redemption representing the share of Saudagar, was *ultra vires* and void ; and, secondly, that neither the mortgage of 1887 by Mangal, nor any of the previous mortgages by him, or by him and Saudagar jointly, were made for necessity. Their plaint contained a prayer in the alternative that, in the event of the mortgages being upheld, they might be decreed to redeem the whole of the land including the share of Ghaniya, the third sharer, for such sum as might be found due. This alternative prayer may be shortly disposed of : if the mortgage be good the plaintiffs cannot at present redeem as the deed contains a covenant against redemption within the term of five years.

The contention that Mangal's mortgage of Saudagar's share was *ultra vires* is good ; but the defendants, having *bonâ fide* redeemed the mortgage effected by Saudagar himself in 1878, may retain possession under an equitable lien and cannot be disturbed by the plaintiffs until they are paid by the latter what they have paid in clearing off the charge created by Saudagar himself in 1878, which the plaintiffs, as heirs of Saudagar, would have been bound to pay before they could have obtained possession from Saudagar's mortgagees.

The question of necessity has now to be considered ; and in the present case it arises in this form—whether the antecedent debt was a sufficient necessity for the alienation against

which the plaintiffs sue. It seems to me clear that the payment of a debt proved to be in existence and recoverable by law is a sufficient justification for the raising of money to pay it through an alienation of ancestral land by a childless proprietor. The creditor might sue his debtor and sell the whole title in the land under his decree, and I see no reason why the proprietor himself may not sell to the creditor or to any one else for the purpose of obtaining money to effect the result which could be obtained by the help of the Court. I think that the proved existence of a *bonâ fide* debt recoverable by law was a sufficient necessity for the execution of the mortgage in this case. But it is urged that the necessity of all the previous mortgages must be inquired into by the creditor and he must satisfy himself of its sufficiency in each case before he can be protected. It seems to me that this follows as a sound deduction from the Full Bench Ruling in *Punjab Record*, No. 107 of 1887, with regard to cases arising in that part of the country to which the judgment refers. I recognise an essential difference between a proprietor's estate and that of a widow, but it seems to me that the difference becomes a mere shadow when a proprietor is held liable to restraint by a distant heir in the matter of alienation upon the ground of necessity. I am not at present prepared to agree that, on principle, collaterals have the same power to question an alienation as that possessed by sons. I think an essential difference is to be found between the position of a son and that of one collateral heir, and that the former possesses *a priori* a larger power to restrain an alienation than that possessed by a collateral. But when an equal right is reserved to a distant heir under a custom, the status of a proprietor is practically reduced to that of a holder for life with a power of disposition similar to that of a widow.

The result of the Full Bench Ruling seems to me therefore to be that the last creditor lending upon the security of ancestral land must satisfy himself of the necessity for the previous debts for the payment of which the proprietor borrows: if the original debt was one for which the property could not be charged, the insufficiency runs down the whole line and affects every contract in which the original debt is incorporated, or upon the consideration of which the later debt was contracted for which the subsequent charge was created. The parties in this case belong to the district to which the parties in the Full Bench case belonged, and I hold the appellants' contention to be a sound deduction; but the strict application

of the rule would in some cases be difficult, and such cases must be dealt with according to their special nature as they arise. Applying the rule in this case, I find that the land has been continuously subject to mortgage since 1859, and no objections were ever made until the present suit: this is amply sufficient to put upon the plaintiffs the onus of proving an original invalidating cause, which in the present instance is the want of necessity. There is not the least ground for supposing that the debts, or any of them, were tainted with immorality or anything which would have prevented their recovery in a Court of law; and I must hold that a sufficient necessity existed for contracting each of them. I concur in dismissing the appeal with costs.

Appeal dismissed.

NOTE.—The following are the unpublished cases referred to in the above judgment:—

APPELLATE SIDE. {

KAHAN SINGH,—(DEFENDANT),—APPELLANT,

Versus

GOUHAR AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CIVIL APPEAL, No. 1174 of 1890.

(RIVAZ & STOGDON, JJ.)

Further appeal from the decree of C. P. Bird Esquire, Additional Divisional Judge, Amritsar, dated 6th August 1890.

Claim.—Declaration of reversionary right as to a sale of 8 ghumaos 2 kanals and 8 marlas of land.

J. C. Basu, for appellant.

Browne, for respondents.

6th February 1892.

JUDGMENT.—We think that the Divisional Judge has varied the order of the first Court on most inadequate grounds.

The first Court gave good reasons for holding upon the evidence that all the items which go to make up the Rs. 400 (of which a detail is given in the first Court's judgment) were expended either upon paying off the debts of the vendor (evidenced by written deeds), or, in the case of a few petty items, for necessary purchases. The Divisional Judge has apparently scrutinised this evidence with a view to discover whether the debts themselves were incurred, i. e., the bonds and the mortgages were given, for necessity, applying the same test which might perhaps properly be applied to the case of an alienation by a widow with a limited interest in her deceased husband's property. But the cases are, we think, not analogous. After the husband's death, the widow can alienate to pay his just debts, for whatever purpose incurred, and surely the male proprietor's own power of alienation during his lifetime is not less than that of the widow after his death.

We accept this appeal, and restore the order of the first Court dismissing the plaintiff's suit with costs throughout.

THAKAR AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

GOPALA AND BANNA,—(DEFENDANTS),—RESPONDENTS.

CIVIL APPEAL, No. 289 OF 1891.

(BENTON & STODDON, JJ.)

Further appeal from the decree of P. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 19th February 1891.

APPELLATE SIDE.

Claim.—Declaration to the effect that the mortgage deed, dated the 2nd August 1884, executed by defendant No. 1 in favour of defendant No. 2, for 12½ ghumaos 1 kanal and 8 marlas of land for Rs. 2,040, shall not affect the rights of the plaintiffs as reversionary heirs after the death of defendant No. 1.

Turner, for appellants.

Rattigan, for respondents.

BENTON, J.—This was a suit brought by the reversioners of one Banna, 19th March 1892. eleven in number, to have it declared that a mortgage deed executed by him on the 2nd August 1884, in favour of the other defendant Gopala, shall not affect their rights as reversioners. They alleged that the deed was executed fictitiously without any necessity.

The consideration stated in the deed is as follows:—

On mortgage deed without possession, dated 6th

	Rs.	a.	p.
April 1882	1,222	0	0
On bond, dated 11th December 1883	400	0	0
Interest on both these bonds	290	0	0
Cash before the Sub-Registrar	128	0	0
Total	Rs. 2,040	0	0

The plaintiff was filed on the 18th July 1890, when the period of limitation had nearly expired: it was returned for amendment and was again filed on the 1st of August.

The defendant Gopala ultimately admitted that Banna, his mortgagor, was on the same footing with regard to the power of alienation as Punjab agriculturists generally, viz., that he could alienate for necessity and not otherwise. He alleged that the alienation to him had been necessitated by the expenses of marrying five daughters, by losses caused by season, and mourning expenses. He maintained that the part of the consideration which was due to the mortgage deed of 1882, could not now be disputed in consequence of the law of limitation, and that the plaintiffs' conduct precluded them from contesting the transfer. The defendant Banna was evidently colluding with the plaintiffs, and his examination showed him in a very unsatisfactory light.

The issues tried were—

1. Whether the claim was barred by time as regards the mortgage deed of 1882?
2. Whether the plaintiffs by their acts or omissions sanctioned the mortgage and are therefore now estopped from denying it?
3. Whether there was legal necessity for it as alleged?

The first Court found that limitation was no bar to the present suit, as the present mortgage was an entirely new contract. With regard to the second issue, it found that the plaintiffs had done nothing to preclude them from seeking to be relieved of the present mortgage deed.

With regard to the question of necessity, the Court after discussing the evidence in detail came to the conclusion that no facts were established from which it appeared that there was any necessity for the transfer.

The first Court therefore gave the decree asked for.

The Divisional Judge thought that the result was manifestly inequitable, and that the mortgagor's circumstances with his five daughters, who had all been married away, were manifestly such as might lead the lender to conclude that the borrower had necessity for the money lent. He thought that there was no reason for believing that the lender had acted recklessly or *mala fide*.

The question of limitation, of the conduct of the parties, and of the necessity for the mortgage according to the evidence have been discussed before us in argument.

With regard to limitation and the conduct of the parties, I see no reason for arriving at a conclusion different from that come to by the first Court.

The question we have to decide is, whether this deed of 1884 ought to be declared invalid. Its execution is the cause of action from which limitation dates. When we come to discuss it in detail we may find that it is valid in whole or in part, but I conceive that it would be no good reason for holding that there was an undisputed liability in regard to one item, because it had been the subject of a previous deed which, if it had not been merged in the present deed, could not be contested on the ground of limitation. What is now disputed, among other things, is the accepting that liability in the deed of 1884, and saddling the property with it, and this is a question which is not now barred by limitation.

The plaintiffs' conduct has been exceedingly unsatisfactory in waiting until the last moment before bringing their suit when the evidence for the defence could hardly be satisfactory. They are at the same time quite within their rights in not suing before limitation compels them. They must, however, pay the penalty for adopting this course in the necessity for the Courts making all proper allowances for such evidence as has been produced.

The real issue in the case is, as I conceive it, not whether for the defence it has been established that every rupee of the charges imposed on the estate has been satisfactorily accounted for, but whether the transaction impugned has been entered into between the defendants *bonâ fide* on the part of Gopala, because he had reason to believe that the borrower required the money, or, as alleged, fraudulently and fictitiously without any necessity, and with the intention of injuring the plaintiffs.

It must be admitted that the evidence for the defence is not quite satisfactory. The plaintiffs are in great measure to blame for this by

reason of their delay in suing, and by the way in which they conducted their case. The defendant Gopala was ready to produce his books and wished to examine a witness with reference to his books in support of the mortgage deed, but the plaintiffs' pleader interfered and got the Court to refuse the evidence on the ground that it was inadmissible at that stage, without any good reason that I can see. The evidence for the defence though not quite satisfactory is as good as could be expected under these unfavourable circumstances. Banna's collusive behaviour, in my opinion, goes a considerable way towards supporting it. I see nothing improbable in Banna, a Brahmin, with a family of daughters and with no sons to assist him, getting gradually in debt for over Rs. 2,000, having regard to the extent of his ownership which extends to 133 ghumaos or half the village, which cannot be a large one. I find that the transaction was entered into *bonâ fide*.

I would therefore affirm the decree of the Divisional Judge and dismiss the appeal with costs.

STOGDON, J. —I concur.

No. 91.

AZIZ DIN,—(PLAINTIFF),—APPELLANT,

Versus

SHAM DAS AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 302 of 1891.

(STOGDON AND BULLOCK, JJ.)

} APPELLATE SIDE.

Punjab Laws Act, 1872—Pre-emption—Compensation for improvements made by original purchaser—Form of decree.

The practice of the Court to award compensation for improvements to a vendee who has made them in good faith, or who may appear to be equitably entitled to it, followed and affirmed.

Punjab Record, Nos. 34 of 1875, 74 of 1875 and 38 of 1889, referred to.

Per BULLOCK, J.—The decree in such cases should provide separately for the payment of the pre-emption money and the payment of compensation, and that payment of the former within the time fixed in the decree should save the decree from forfeiture, though the compensation be not paid (cf. Section 214, Civil Procedure Code).

Further appeal from the decree of Colonel O. H. T. Marshall, Divisional Judge, Lahore, dated 4th February 1891.

K. P. Roy, for appellant.

J. C. Basu, for respondents.

This was a suit for pre-emption. The main question raised by the appeal was as to the original vendee's right to compensation for improvements made to the property in suit.

The question of the form of the decree to be made in such cases was also considered.

The following judgments were delivered :—

24th May 1892.

SROGDON, J.—On the 11th August 1887, Pir Bakhsh sold to Sham Das a house in Lahore for Rs. 300. On the 10th August 1888, Aziz Din sued for pre-emption, alleging that the purchase money had not been fixed in good faith. The vendee admitted plaintiff's right of pre-emption, and pleaded that he had paid Rs. 300 for the house and had subsequently spent a large sum of money on making additions to it. The first Court found that the price had been fixed in good faith and gave plaintiff a decree for pre-emption on payment of Rs. 1,000, which sum included sums spent on additions to the house up to the time when the vendee received notice of the suit. Both parties appealed to the Divisional Judge who enhanced the amount payable by plaintiff to Rs. 1,848-11-0. Plaintiff then appealed to this Court urging, among other things, that the price entered in the sale-deed was not fixed in good faith: that he ought not to have been compelled to take over the house built by the vendee: that the sum decreed for compensation was excessive: and that the Court's order as to costs was wrong. The vendee filed a cross-objection to the effect that a larger sum ought to have been allowed to him as compensation for improvements.

With regard to the purchase money, I do not think it has been sufficiently shown that the sum of Rs. 300 was not fixed in good faith. The details according to the deed are—

Cash to vendor	152
Paid to Bibi Ráni, mortgagee	98
Paid to Karm Iláhi	50
<hr/>	
Total Rs.	300
<hr/>	

According to an endorsement on the deed, Rs. 200 were paid at registration and Rs. 100 previously to it. The vendee explained that he paid Bibi Ráni Rs. 98 and Rs. 100 cash before the Sub-Registrar and Rs. 53 to the vendor in advance and Rs. 50 to Karm Iláhi. The vendor admitted receipt of Rs. 50 or Rs. 60 in advance. The evidence is perhaps not quite as clear as it might be; but the property seems to have been worth Rs. 300, and both Courts have concurred in holding that that sum was paid

and sufficient cause has not been shown why their findings should be set aside.

With regard to the question of compensation, it appears from plaintiff's statement that he was at Jullundur when the sale was effected. Twenty or twenty-five days after registration he sent the vendee, Sham Das, a written notice of his claim to pre-emption. On his return to Lahore, he also gave him verbal notice of it on the 2nd September 1887. Sham Das sent him a postcard asking him to let him know, by return of post, whether he wished to purchase, so that he might stop building. He claimed payment of Rs. 300, plus cost of stamped paper, registration and improvements. Plaintiff replied by card on the 3rd September 1887, and on the 6th September 1887 he sent Sham Das a long written notice informing him that he would not pay more than the market value of the property and warning him to stop building. He took no steps, however, to enforce his claim to pre-emption till the day before the expiration of the period of limitation, when he instituted the present suit. His house adjoins the property in dispute, and he was perfectly well aware that building was going on, but he took no further steps either to stop it or to assert his rights, and there is evidence that the vendee's workmen used to pass over his roof to their work without any remonstrance being made by him. These are the facts, and on them the learned Counsel for appellant urges that Sham Das built at his own risk and that he is not entitled to any compensation, but can only claim to be allowed to remove his materials. It has undoubtedly been the practice of this Court to award compensation for improvements to a vendee who has made them in good faith, or who might appear to be equitably entitled to it, and cases published as *Punjab Record*, No. 34 of 1875, No. 74 of 1875 and No. 38 of 1889, may be quoted as instances in which such compensation has been awarded. Other cases could doubtless be found among the published or unpublished decisions of the Court, and I think it is now too late to urge that compensation for improvements cannot be legally awarded. I am disposed to think that Sham Das did not act in good faith in the first instance. Although he knew perfectly well that plaintiff had a right of pre-emption, he began to build with the most suspicious alacrity, and it is very probable that his object was to defeat plaintiff's right or to render it difficult for him to exercise it. If plaintiff had followed up his notice by immediate action, I should have

been disposed to hold that Sham Das was not entitled to compensation, and it would have been no great hardship to compel him to remove the small additions made by him ; but plaintiff's laches were so great—he was so remiss about suing, and so neglectful about his own interests—that he is not entitled to any consideration. He stood by while the house was being built : he made no effort to stop the building. His conduct was of such a nature as to justify Sham Das in believing that he acquiesced in it and that he did not intend to press his claim, and even if he is not estopped from pleading that Sham Das is not entitled to compensation, he is certainly bound in equity to pay it to him, and I quite concur in the remark made by the Divisional Judge regarding his conduct.

The next question is as to the market-value of the property. The evidence regarding this is most conflicting. After hearing Counsel on both sides, I consider that no better approximation to the value is to be arrived at than that fixed by the Divisional Judge. I would therefore dismiss both the appeal and cross-objection, and I would leave each party to pay its own costs throughout.

25th May 1892.

BULLOCK, J.—On the 11th of August 1887 the defendant purchased a house of which he knew and admitted that the plaintiff had a right of pre-emption: he gave no notice to the plaintiff, but purchased during his absence and immediately began to make additions to the house. On the sale coming to plaintiff's knowledge, he wrote to the defendant informing him that he intended to sue for possession, and warning him not to continue his building: the defendant nevertheless continued to build and now claims compensation for what he has expended. The first Court decreed possession to the plaintiff conditionally on his paying defendant Rs. 1,000 within a fixed period, and, failing payment within that period, the decree was to be void and the suit was to stand dismissed. On appeal, this decree was varied, and the plaintiff was ordered to pay Rs. 300 as the original price of the house and Rs. 1,548-11-0 for the additions: and the whole sum of Rs. 1,848-11-0 was to be paid within thirty days of the date of the decree.

I do not see upon what principle a decree for pre-emption should become void for failure to pay compensation. *Prima facie* it is a hardship to compel a man to buy what he does not want ; and if the law confers upon him the right of purchasing property he is entitled to receive it in the condition in which

it was at the time at which his right accrued, that is, at the time when it was sold. If then the property be deteriorated in the hands of the purchaser, I feel no doubt that the pre-emptor might claim an abatement of the price. On the other hand, it is said that if the purchaser expend money on the property he is entitled to compensation. There are thus two distinct things to be decided in cases of this nature: there is the claim for pre-emption, which has to be decided according to law or custom, and there is the counter-claim of the defendant, which has to be decided by a consideration of what is just and equitable.

With regard to the claim for pre-emption in the present suit, there is no difficulty in holding that the price of Rs. 300 entered in the conveyance was the *bonâ fide* price agreed on, and the plaintiff would at any rate be entitled to a decree for possession on payment of this sum, subject to the usual proviso as to default of payment within the allotted period. But why should the decree be forfeited for non-payment of the compensation, which is entirely distinct from the matter of pre-emption? When a man sues for pre-emption of property at a certain price, he should be ready with the price when he makes his claim, but it might be productive of great injustice if a plaintiff, whose right was worth but a small sum, were called upon to pay ten times the amount before the expiry of a period within which he could not possibly raise the money. It is clear to my mind, therefore, that the decree should provide separately for the payment of the pre-emption money and the payment of compensation, and that payment of the former within the time fixed in the decree should save the decree from forfeiture though the compensation be not paid. The language of Section 214, Civil Procedure Code, seems to support this view. It is now too late to argue that compensation should not be awarded for a purchaser's expenditure: there are several cases to be found in which such compensation has been awarded, but each case should be closely examined, for, as a rule, the *bonâ fides* of purchasers who spend money upon property which they buy subject to pre-emptive rights is open to doubt. In the present case, for instance, what possible advantage could the defendant have anticipated from spending his money? He knew from the first that the plaintiff's right was superior to his own, and he admitted it: he was informed by the plaintiff that he intended to prosecute his right and was warned against continuing to build: he knew in fact that the plaintiff needed only to file a

suit in order to recover possession, and yet he went on building. He could have expected no advantage to himself, and his conduct is explicable only on the supposition that he intended, if possible, to put it out of plaintiff's power to enforce his undoubted and admitted right. Looking at the case from this point of view, the defendant is not entitled to the slightest sympathy, and his claim for compensation should be refused. But the plaintiff's conduct also exhibits some peculiar features and they must be considered. In the first place, he did not bring his suit until the day before the time allowed by law for bringing it. Now, mere silence or delay within that time cannot prejudice the plaintiff's right, but it may be an important element in determining what consideration the Court shall show him when he appeals to it to do equity. The plaintiff's house adjoins the house in suit, and he saw the defendant carrying on his building for a year. He appears to have made no remonstrance: he even permitted the defendant's workmen to pass over his premises in the course of building, and I think he is bound to offer some good explanation for his conduct. If he could show reasonable cause for his behaviour, I should have no hesitation in rejecting the defendant's claim, for I have no doubt that each knew perfectly well what was in the other's mind, and that defendant did not continue to build believing in plaintiff's acquiescence; but the plaintiff can show no satisfactory cause for his conduct. He has made it possible for the defendant to urge, with some show of reason, that the plaintiff's apathy entitled him to treat the threat to sue as an idle menace, and that he was justified in improving the property. I agree, therefore, to the dismissal of the suit and cross-objection, but I do not think either plaintiff or defendant entitled to any consideration, and each must pay his own costs throughout.

Appeal and cross-objection dismissed.

No. 92.

APPELLATE SIDE. { **JIWA, — (PLAINTIFF), — APPELLANT,**
Versus
MUSSAMMAT BHARI AND OTHERS — (DEFENDANTS), —
RESPONDENTS.

Case No. 192 of 1891.

(STODDON AND BULLOCK, JJ.).

Punjab Laws Act, 1872—Pre-emption in village—Custom—Construction of administration paper to effect that no sale or mortgage had ever occurred.

The village administration paper framed at first settlement recorded that no sale or mortgage of land had ever occurred in the village, and

then prescribed that any one wishing to sell or mortgage his land must make the first offer of it to the *shurka shikmi wa yak jaddi*.

Held, in claims for pre-emption relying on this entry, that neither the entry, nor the other evidence, established that a custom regulating pre-emptive rights existed in the village, and that the claim must be disposed of in accordance with the provisions of Act IV of 1872 (Punjab Laws Act).

Further appeal from the decree of Colonel H. M. M. Wood, Divisional Judge, Jullundur, dated 2nd January 1891.

A. L. Roy, for appellant.

This was a suit for pre-emption of land situate in a village.

The plaintiff claimed pre-emption on the grounds that he was a relation of the vendor and that his land was in the vicinity of that sold.

The principal question for decision in the appeal was as to the matter of custom, and the effect to be given in that connection to the entry in the first administration paper of the village.

The judgment of the Chief Court, from which the facts sufficiently appear, was delivered by

BULLOCK, J.—The grounds on which the plaintiff claimed pre-emption were that he is a relation of the vendor and that his land is in the vicinity of the land which has been sold. The first Court gave the plaintiff a decree, but this was reversed on appeal. The Divisional Judge based his decision on the provisions of the Act: he gave no consideration to the matter of custom, and has assigned no reason for not doing so. 7th June 1892.

The *Wajib-ul-arz* of this village framed at the first settlement records that no sale or mortgage of land had ever occurred in the village, and then goes on to prescribe that any one wishing to sell or mortgage his land must make the first offer of it to the *shurka shikmi wa yak jaddi*. The plaintiff is not a sharer in the land, but he is a *yak jaddi*. We do not think it necessary to discuss the meaning of the above expression, for we are clearly of opinion that the *Wajib-ul-arz* is absolutely valueless for the purpose of *primâ facie* establishing a custom. A document framed in this manner is not only useless, but may be mischievous. It usurps a legislative character: it necessarily implies that no custom exists or can exist, and then proceeds to make provision for cases that may potentially arise in future. A *Wajib-ul-arz* couched in the terms of

that under discussion is evidence of the non-existence of a custom, and that this is a correct construction in the present instance, appears clearly from the record made at the next settlement, in which it is set forth that no particular custom exists on the subject of pre-emption. We therefore find without hesitation that, so far as these documents are evidence, they show that no custom exists in this village with reference to pre-emption.

We also consider that the question is not altered by regarding the *Wajib-ul-arz* of the first settlement as an agreement. Whether a custom exists or not is a fact: the document recording that fact is either a true record or it is not; and whichever character attaches to it at the time when it is made must attach to it for all time. It is therefore inconsistent to speak of it as an agreement which may last for a time or be subject to change, and a document which is an agreement for the purpose of prescribing the law which shall apply in the event of certain cases arising in the future is no record of a custom. Viewed as a rule of future application to possible cases, it is worthless in itself, and is *ex facie* not a spontaneous declaration.

Passing on now to a consideration of the evidence offered to prove the custom, we are of opinion that it altogether fails to establish any such custom as is urged. We therefore find upon the whole issue that no custom regulating pre-emptive rights exists in this village: the claim must therefore be disposed of in accordance with the provisions of the Act.

The village is not held on ancestral shares and the plaintiff can claim no superior right on the ground of relationship to the vendor; nor does such a right accrue to him on any other ground which has been put forward.

The appeal is dismissed with costs.

Appeal dismissed.

No. 93.

GANGA RAM,—(DEFENDANT),—APPELLANT,

Versus

ASA NAND,—(PLAINTIFF),—RESPONDENT.

Case No. 1450 of 1890.

(FRIZELLE AND STODDON, JJ.)

APPELLATE SIDE. {

Custom—Gift to daughter's son in presence of nephew—Khatris of Ahmadpur, tahsil Shorkot, Jhang District.

Found, that a gift by a sonless Khatri of a village in the Shorkot tahsil of the Jhang District, of ancestral immoveable property, in favour

of his daughter's son, was invalid by custom in the presence of a nephew of the donor.

Further appeal from the decree of Khan Muhammad Hyat Khan, C. S. I., Divisional Judge, Mooltan, dated 3rd November 1890.

Lal Chand, for appellant.

P. C. Chatterjee, for respondent.

The sole question for determination in this appeal was as to the validity by custom of a gift by a sonless Khatri of the village of Ahmadpur in the Shorkot tahsil of the Jhang District of 41 kanals 11 marlas of land, a dwelling house and a shop, his ancestral property, all situate in that village, in favour of a daughter's son, in the presence of so near a collateral as a nephew.

The donor died shortly after making the gift which was evidenced by a registered instrument.

The facts sufficiently appear from the judgment of the Chief Court, which was delivered by

STODOL, J.—Ganesh Das, a sonless Khatri of the village of 28th Jany. 1892. Ahmadpur in the Shorkot tahsil of the Jhang District, on the 29th January 1889, executed and registered a deed, gifting to his daughter's son, Asa Nand, 41 kanals 11 marlas of land, a dwelling house and a shop, all situated in Ahmadpur.

Shortly after the making of the gift, the donor died at the house of the donee in the village of Kach Kamir. Upon his death, his nephew, Ganga Ram, took possession of his property. Asa Nand sued him for possession of it, basing his claim upon the deed of gift.

Defendant pleaded—

- (a) That the gift was not followed by possession.
- (b) That the gifted property was ancestral, and Ganesh Das had no power to make the gift in the presence of such a near collateral as himself.

The first Court found that the gift was invalid by custom, but on appeal the Divisional Judge passed a decree in plaintiff's favour, from which defendant has appealed to this Court.

There has been some discussion as to whether the gifted property is to be regarded as ancestral. Defendant clearly pleaded that it was ancestral, and plaintiff did not traverse his plea; and even now he is not prepared to say that it is not ancestral. Under such circumstances, it must be held to be ancestral.

The evidence as to custom produced by either side is of very little value. Defendant called a few Khattris of Maghiana which is thirty kos from Ahmadpur, who testified to certain gifts of house property by Khattris and others to daughters and daughters' sons. The instances most relied on were those of Lorinda and Narain, but they even were not well authenticated, and there is no certainty whether the property was ancestral or acquired, or whether the so-called donees obtained it by virtue of a gift or inherited it as heirs on the so-called donor's death. None of the parties to the gifts or their relatives were called, and the evidence was entirely that of strangers. One of them named Gulli testified to a gift made by his father's uncle, Dhanna, to his daughter's son, but he admitted that Dhanna died five years before he was born. Cases of this nature are of no value as precedents, because they occurred among town Khattris, and also because it is not clear whether they are cases of gift or of inheritance. In the present case, it has never been alleged that plaintiff, as daughter's son of Ganesh Das, has a better right to succeed to his property than defendant, the son of his brother.

Turning to the documentary evidence, we find that paragraph 9 of the *Wajib-ul-arz* of the first settlement of Ahmadpur permits a proprietor to gift his land to any one he pleases. This unrestricted power of gift is of such an unusual nature that it is impossible to believe that the paragraph in question contains a true exposition of the views of the proprietors on the subject. The answer to Question 45 of the *Riwaj-i-am* of the present settlement is to the same effect, but its value is nullified by the answer to Question 47, which declares that a man can only gift to his collaterals (*ek jaddi*) and not to strangers (*ghair kaum*). The answer to Question 58 is also to the effect that a proprietor cannot gift his property to some of his sons and heirs to the exclusion of other sons and heirs. The above answers were recorded to questions put to members of the Sayad tribe, and the Khattris, along with the members of many other tribes, are said to have stated that their customs were identical with those of the Sayads. This fact tends to show that the *Riwaj-i-am* cannot have been prepared with great care, and the Settlement Officer in his Report does not appear to attach a very high value to it. For the above reasons, we do not consider that the documentary evidence proves anything, either for or against the validity of the gift. The general presumption certainly is against the validity of such a gift in

the presence of such a near collateral of the donor as defendant. It was un rebutted, and the suit was therefore rightly dismissed. We accept the appeal and restore the decree of the first Court with costs throughout.

Appeal allowed.

No. 94.

LAL SINGH,—(PLAINTIFF),—APPELLANT,

Versus

GOPAL DAS AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 173 of 1891.

(STOGDON AND BULLOCK, JJ.)

Regulation XVII of 1806—Application to foreclose—Minor—Notice how to be served.

Held, that the presentation of a written petition under Section 8, Regulation XVII of 1806 by a person acting under a general power of attorney from the holder of a deed of mortgage, was a valid one.

Held, further, that the copy of the application and parwana referred to in the Section in question were sufficiently served on a minor mortgagee, for whom no guardian had been appointed under the Act, by service on his brother with whom he lived.

2 N. W. P. Reps., 444, followed.

Further appeal from the decree of Colonel C. H. T. Marshall, Divisional Judge, Lahore, dated 22nd December 1890.

Roshan Lal, for appellant.

P. C. Chatterjee, for respondents.

This was a suit for redemption of a mortgage by conditional sale.

The period for which the loan was granted had expired and the mortgagee had taken proceedings for foreclosing the mortgage under Regulation XVII of 1806.

The principal contention of the plaintiff was that he was a minor at the time of these proceedings, and that no valid service of the application to foreclose had been served in accordance with Section 8 of the Regulation.

The judgment of the Chief Court dismissing the appeal was delivered by

BULLOCK, J.—The plaintiff's father mortgaged the land in suit in 1869 with the condition that, if not redeemed within four years, the mortgage should become a sale. In 1874 the mort-

2nd June 1892.

gatee took proceedings for foreclosing under Regulation XVII of 1806 and the usual notice was served, but the mortgagee took no further steps for completing his title. The plaintiff now sues to redeem the property, and alleges that the proceedings taken under the Regulation are invalid. His first objection is that the petition was not presented by the mortgagee himself or by one of the vakils of the Court. The petition was presented on behalf of the mortgagee by a person acting under a general power of attorney, and we think the presentation was a valid one: the terms of the Regulation appear to be directory and do not exclude the employment of an agent. The law of procedure in force at the time of the application was Act VIII of 1859, the 16th Section of which had been introduced into this Province without any limitation: it provided that all applications to any Civil Court, except when otherwise specially provided by the Act, should be made by the party in person or by his recognized agent or by a pleader duly appointed; and by Section 17, which was also introduced into this Province with a proviso further enlarging its scope, a recognized agent included a person holding a general power of attorney from a person not within the jurisdiction of the Court. This description applied to the mortgagee, and as we consider that the directions contained in the Regulation were not mandatory, so as to require that the petition should be presented by the mortgagee in person, we hold the petition to have been duly presented.

It is next objected that the application and the Judge's *parczna* were not duly furnished and notified to the plaintiff. The plaintiff was at that time a minor living with his mother and his brother Nihal Singh, and service was effected on Nihal Singh. It is proved by evidence that the documents had been tendered to the minor and his mother, who refused to accept them on the ground that Nihal Singh was the head of the family, and they were therefore served on Nihal Singh as manager of the family. It is proved also that Nihal Singh did occupy that position, and we consider that the necessary documents were duly furnished and notified to the mortgagors. The case of *Dabee Parshad v. Man Khan*, 2 N.W.P., 444, appears to support our view. In that case it was held that as the Regulation does not give any special direction as to the person on whom service is to be made when the person entitled to the equity of redemption is a minor, and no guardian had been appointed under the Act, service on the minor and his mother would be sufficient.

It is urged before us that no demand is proved to have been made before the mortgagee resorted to proceedings under the Regulation, but we find ample evidence on the record that a demand of payment had been made, and this evidence appears to be entitled to credit. We dismiss the appeal with costs.

Appeal dismissed.

No. 95.

CHUHAR & OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

**MAYA, NATHU AND GOBIND,—(DEFENDANTS),—
RESPONDENTS.**

} **APPELLATE SIDE.**

Case No. 1279 of 1889.

(BENTON AND RIVAZ, JJ.)

Custom—Alienation—Gift by sonless proprietor to step-sons—Hindu Bhains Jats of the Jullundur District.

Found, that in the village of Bhains in the Nawashahr tahsil of the Jullundur District, a gift by a sonless proprietor, a Hindu Jat of the Bhains gôt, to his step-sons, was sufficiently justified by custom.

Held, also, that considering the various castes of which the proprietary body was now composed and the number of gifts that had been made to relations without objection, it was for the plaintiffs to prove that the alienation to step-sons was inadmissible by custom, and that they had failed to discharge the onus.

Punjab Record No. 107 of 1887 referred to.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Jullundur, dated 20th August 1889.

Bates, for appellants.

Rattigan, for respondents.

This was a suit by collaterals for a declaration that a gift of 82 kanals 17 marlas of land to his step-sons made by a sonless Jat of the Bhains gôt would not affect their rights of inheritance on the donor's death.

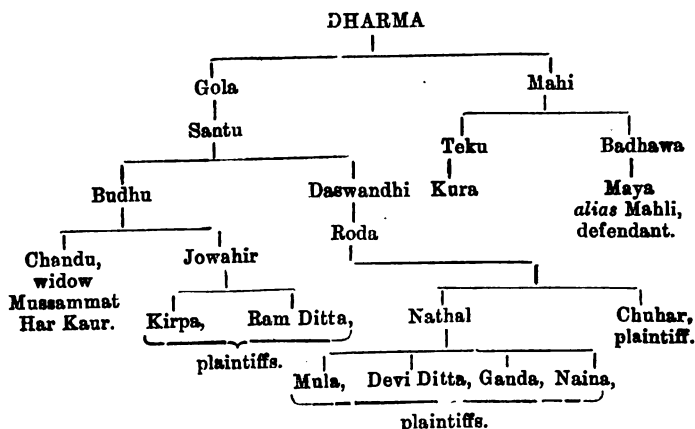
The parties were residents of Mauza Bhains in the Nawashahr tahsil of the Jullundur District.

At the first hearing of the appeal a further enquiry was directed regarding the foundation of the village and the

circumstances under which the present proprietors had acquired their rights, by the following interlocutory order made by

10th July 1891.

STODDON, J. (BEACHCROFT, J., concurring)—



On the 5th March 1883, Maya, a sonless Jat of the Bhains gôt, gifted 82 kanals 17 marlas of land to his step-sons, Nathu and Gobind.

Plaintiffs, who are the nearest collaterals of Maya, except Kura, who is his first cousin, sued for a declaration that the gift would not affect their rights on the donor's death. Defendants pleaded that the gift was valid by law and custom; that plaintiffs were too remotely related to the donor to be entitled to sue; that they could not maintain the suit in the presence of Kura; and that they had always lived with Maya, and had cultivated his land and had been treated by him as sons. The first Court passed a decree in plaintiffs' favour; but the Divisional Judge reversed it, because he was of opinion that plaintiffs had failed to prove that in the donor's tribe, collaterals, so far removed as the plaintiffs, have the power to prevent a childless landowner from making a gift to his step-sons who have been brought up by him and have assisted him like natural sons, of property which is not shown to be ancestral.

Plaintiffs have appealed to this Court. The case turns almost entirely on the question of the burden of proof. For plaintiffs it is contended that the land is ancestral, in the sense that it originally belonged to Dharma, the common ancestor of themselves and the donor. It is admitted that the proprietary right in the village is in the hands of several tribes of Jats and also of other tribes, such as Khatris, Brahmins, Nais and Bairagis; but it is urged that this fact is not sufficient to take

the case out of the category of cases referred to in the Full Bench Ruling of this Court published as *Punjab Record*, No. 107 of 1887. On the other hand, it is pointed out for respondents, that plaintiffs never alleged that the gifted property was ancestral, and it is contended that the Full Bench Ruling does not apply because the communal relationship has been split up, and the proprietary body consists of an agglomeration of persons belonging to various tribes. It appears that plaintiffs did not state in their plaint that the land was ancestral, but defendants did not allege in their pleadings that it was not ancestral, nor did they base their appeal to the Divisional Judge on this ground. Had the land been non-ancestral, it is not at all likely that they would have failed to avail themselves of a plea, which, if established, would have been fatal to plaintiff's claim. Dharma was the donor's great grandfather. There is no allegation that the members of the family have lately taken up their abode in the village, or that they have acquired their rights by purchase, and the fact that they are Bhains Jats, and that the village is also called Bhains, gives rise to a strong presumption that the village was founded by their ancestors. The theory that the land was not ancestral appears to have been started by the Divisional Judge himself. Defendants merely pleaded that a sonless proprietor could alienate his land, because the proprietary body consisted of members of different tribes. Even now it is hardly contended before us that the land is not ancestral. All that is said is, that it was not necessary for defendants to deny that it was ancestral, because plaintiffs did not assert that it was ancestral; but we have no doubt that if defendants had had such a good defence to the suit, they would not have failed to avail themselves of it. We think then that the land must be held to be ancestral, and the next question is whether the fact of the proprietary right being in the hands of persons of various tribes is sufficient to take the case out of the category of cases covered by *Punjab Record*, No. 107 of 1887. Before we can decide this question, we must have some information regarding the foundation of the village and the circumstances under which the present proprietors have acquired their rights. If the village was founded by a Bhains Jat, and his descendants have been in the habit of selling their lands without any restriction, then the burden of proof is probably on plaintiffs. Many instances of gifts may not be forthcoming, but there may be instances of sales and mortgages, and such alienations, if made without necessity, are analogous to gifts.

A statement must be prepared showing what tribes own land in the village, the amount of land held by each tribe, and the manner in which it was acquired. Inquiry should also be made as to who founded the village, and the circumstances under which the land has found its way into the hands of different tribes. Alleged cases of alienation, whether by sale or mortgage or gift, should be inquired into, and it should be noted whether any of them have been objected to. Special attention should be paid to the history of the Bhains tribe, and to alienations effected by members of it. Return within three months. The inquiry should be made by the first Court.

On a return being made to the order of remand, the judgment of the Court was delivered by

18th Jany. 1892.

BENTON, J. (RIVAZ, J., concurring).—This case was remanded by order of this Court, dated 10th July 1891, for inquiry as to the history and constitution of the village, with a view to ascertaining who are the present proprietors, how they have acquired their rights, and what the practice has been in regard to restrictions on the power of alienation.

The return goes to show that the village was originally in the exclusive ownership of Jats of the Bhains gôt, but that in recent times Jats of other gôts, and not only they, but also Brahmins, Khattris, Jiwaris, Chumars and Lohars have been allowed to acquire proprietary rights. It would appear that in Sikh times the acquisition of land in the village was a matter of little difficulty, as it was not very valuable. Subsequently, alienations have been common. A list of fifty-four has been furnished with such details in regard to them as could be ascertained, and in fact it is stated that there is not a single family of the original proprietors which has not alienated some of its land.

The *Wajib-ul-arz* lays down that alienations may only be made for necessity. It has been contended for the defendants by their Counsel that proprietors have an unrestricted power of sale. Looking to the *Wajib-ul-arz* and to the general tenor of the circumstances attending the alienations as disclosed by the further inquiry, we are unable to accept the view thus broadly stated. On the contrary, we think that the rule as given in the *Wajib-ul-arz* is, with some qualifications, the correct rule. It must be admitted that, as regards the admission of strangers to the proprietary body, the proprietors are not by any means exclusive. Many alienations admitting proprietors of various

castes have been quietly submitted to. There has been hardly any litigation at all. One case of pre-emption is referred to, and there is another case, which was successful, to dispute an alienation. There have been five cases of alienations to sons-in-law or daughter's sons, and five alienations to agnate relations, none of which have been contested. A son-in-law or a daughter's son is almost as much a stranger as a step-son. The last named is not permitted to inherit; but there is nothing to show that the others are in any better position. Considering the various castes of which the proprietary body is now composed, and considering the number of gifts that have been made to relations without objection hitherto, we consider that it was incumbent on the plaintiffs to prove that the alienation to step-sons, now in dispute, was inadmissible in accordance with custom, and this they have not done. The proper conclusion appears to be that in this village an alienation by a sonless proprietor to relations, who it may be presumed will assist him in his old age, is held to be sufficiently justified.

We accordingly affirm the decree of the lower Court, and dismiss the appeal with costs.

Appeal dismissed.

No. 96.

**KAMMAN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,**

Versus

NATHU AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 33 of 1891.

(BENTON AND RIVAZ, JJ.)

Custom—Alienation—Gift to daughter whose husband is a resident son-in-law—Mussalman Jats of tahsil Phalian, Gujrat District.

The course of decisions, that among Muhammadan Jats and Gujars of the Gujrat District—whose customs in this respect appear to be identical—gifts to daughters whose husbands are *khana damads*, are permitted, but not gifts to daughters whose husbands do not answer the above description, referred to and followed.

Punjab Record, No. 39 of 1887 and 109 of 1891, referred to.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 4th December 1890.

P. C. Chatterjee, for appellants.

Fazl Din, for respondents.

APPELLATE SIDE.

The parties to this suit were Mussalman Jats of the Phalian tahsil of the Gujrat District.

The principal question for decision was as to the custom in force regulating gifts to daughters whose husbands were not *khana damads*.

At the first hearing of the appeal, a remand was directed under Section 566, Civil Procedure Code, for further enquiry on the question of custom, by the following interlocutory order made by

21st Decr. 1891.

BENTON, J. (STODDON, J., concurring).—The plaintiffs are some of the collaterals of one Sharaf, a Jat of tahsil Phalian in the Gujrat District, who died on the 10th April 1889, and they sue for possession of his estate. The defendants are the daughters of Sharaf and the sons of a brother's daughter. In the present appeal we have to deal with two pleas put forward by them. One is that Mussammat Saro is the wife of a resident son-in-law: the other that the deceased Sharaf made a valid gift of half of his land to his daughter and of the other half to the other two defendants.

The Divisional Judge found that it was not established that Mussammat Saro was the daughter of a resident son-in-law or that there had been any gift.

There is a conflict of evidence as to Mussammat Saro's being the wife of a resident son-in-law. We have perused the evidence, and we are not of opinion that Mussammat Saro's husband was a *khana damad*. There seems to be no doubt that the deceased Sharaf attempted to make a gift of his land to his daughter and to the two sons of his niece, the daughter of Fazla, and this fact seems to be almost decisive as to the value of the evidence in support of Khushi's position as *khana damad*. Moreover, the Revenue papers do not show Khushi cultivating the land, but the two male defendants. If Khushi's position as resident son-in-law had been established, he would in all probability have been found cultivating alone, or at any rate in combination with the male defendants. We think that the mutation papers and the evidence of the patwari and other witnesses leave no doubt as to the fact of the intended gift.

The defence must therefore rest entirely on the validity of the gift. In accordance with the *Rivaj-i-am*, answer to Question No. 10, the gift to the daughter is valid, especially if the daughter and her husband reside in the father's house. There

is nothing to show that a childless proprietor may bestow by gift any portion of his estate on niece's sons, who must be regarded as complete strangers. Some doubt is also thrown on the validity of the gift to the daughter in consequence of the case reported as *Punjab Record*, No. 39 of 1887, which, however, was a Kharian case, while this is a Phalian one. In that case, after a remand and complete inquiry, it was found that gifts to daughters whose husbands were not resident in the house of the donor, were invalid.

Under the circumstances, as the validity of the gift according to custom was hardly touched on in the evidence, we remand the case for full inquiry as to the validity of both gifts, on the supposition that Mussammat Saro was not the wife of a resident son-in-law. An endeavour should be made to support whatever conclusion is arrived at by instances, which should be tested with all possible care. The Divisional Judge may have to remand the case to the first Court to make the inquiry, and he should, while doing so, give such directions as he may deem best calculated to elicit the truth. The remand is made under Section 566 of the Civil Procedure Code, and the case should be re-submitted in three months.

Upon a return being made, the judgment of the Court was delivered by

RIVAZ, J. (BENTON, J., concurring).—A return has now been received to this Court's order of the 21st December last. 11th June 1892.

As regards the gift to Kamman and Rahman, the finding is that it cannot in any way be supported, and this finding is undoubtedly correct, and is not even challenged by the appellant's pleader.

As to the gift to Mussammat Saro, the further inquiry has not elicited any precedents which support the validity of the gift. Both the *Wajib-ul-arz* and the *Riwaj-i-am* (clause 10), if construed literally, are in favour of such a gift being upheld. On the other hand, these entries are not supported by any instances, and the general agricultural custom is opposed to such a gift. Further, the course of decisions shows (*vide* especially Civil Judgments Nos. 39, *Punjab Record* of 1887, and 109, *Punjab Record*, 1891) that among the Muhammadan Jats and Gujars of this district, whose customs in this respect appear to be identical, gifts to daughters whose husbands are *khana damade*, are permitted, but not gifts to daughters whose

husbands do not answer the above description. Allowing then for the presumption which legally arises in favour of the correctness of the entry in the old *Wajib-ul-arz*, we still think that the Divisional Judge correctly held in his first order that the present suit should be decreed.

The appeal is therefore dismissed with costs.

Appeal dismissed.

No. 97.

APPELLATE SIDE. {

FAKIR,—(DEFENDANT),—APPELLANT,

Versus

NAWAZISH ALI,—(PLAINTIFF),—RESPONDENT.

Case No. 537 of 1891.

(STODDON AND BULLOCK, JJ.)

Custom—Gift to stranger of remaining ancestral property—Childless Gujar of Rawalpindi District.

Found, that no custom was proved by which a childless Gujar of the Rawalpindi District could make a valid bequest of all his remaining ancestral property in favour of a stranger, an Awan, in the presence of a son of the donor's brother's son.

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Rawalpindi, dated 21st March 1891.

Madan Gopal, for appellant.

In this case Gaman, a childless Gujar of Dhok Nur in the Rawalpindi tahsil, made a written bequest of ancestral land to the defendant, an Awan, resident in the same village. The bequest was impeached by the plaintiff, son of Gaman's brother's son. The defendant pleaded that the alienation was valid: that he had rendered service to Gaman, and had lived with him from his childhood.

It was found that the land bequeathed was all that remained of Gaman's ancestral estate.

The Chief Court found that defendant's pleas were not proved, and that no custom was proved under which the bequest could be made in a valid way.

The judgment of the Court was delivered by

4th June 1892.

BULLOCK, J.—The question in this appeal is whether a bequest of all his remaining ancestral property by a childless Gujar of the Rawalpindi District in favour of a stranger, an

Awan, is valid or not. The defendant alleged that he lived with the testator from an early age and was regarded by him as a son, and rendered service to him.

We do not think any adoption or anything of the nature of an adoption or appointment has been proved, nor do we find any proof that any special services were rendered by the defendant to Gaman. The question then resolves itself into the general one, whether the bequest is valid or not,—no adoption, or appointment of, or service by, the devisee being proved. The Divisional Judge has quite unnecessarily introduced considerations of necessity into the matter, no suggestion having been made by either of the parties that proof of necessity would be requisite to support the bequest. The *wajib-ul-arz* of the first Settlement contains no provision applicable to the case before us; but according to Robertson's Customary Law, a testamentary disposition of property may be made without the consent of heirs. It does not, however, follow from this that such a disposition may be made without limitation in favour of all and any classes of persons, and the defendant's plea and evidence show that he founds his claim upon the fact that he comes within a certain description. This description is in our opinion not proved to be correct; and the conclusion at which we arrive is that no custom has been proved under which the bequest under consideration could be made in a valid way. We therefore dismiss the appeal with costs.

Appeal dismissed.

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No. 98.

MUTSADA SINGH & ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

DEVI DITTA & OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 1295 of 1889.

(BENTON AND RIVAZ, JJ.)

Custom—Adoption—Person adopted of different gôt.

Found in a suit the parties to which were Jaj Jats of the Hoshiarpur tahsil, that no custom was established permitting the adoption of a person of a different gôt—a step-son, or a gift of land to him in presence of near collaterals descended from the donor's father.

Punjab Record, No. 156 of 1890, referred to.

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Hoshiarpur, dated 12th August 1899.

P. C. Chatterjee, for appellants.

Lakshmi Narain, for respondents.

The defendant, Mutsada Singh, a Jat of the Jaj gôt in the Hoshiarpur tahsil, executed a deed of gift of land in favour of the defendant Gurdit Singh, in which it was stated that Gurdit Singh had been brought up from childhood by the donor, supported, married and treated as a son, and that he was appointed by it sole heir, representative and adopted son.

The donor was about 60 years of age : Gurdit Singh was aged about 35, was of a different gôt, and a step-son of the donor.

The gift was contested by the collaterals of the donor, his brother, nephews and nephews' sons.

The lower Court found against the fact of adoption and decreed the claim. In the Chief Court, after a full enquiry, held that the burden of proving the validity of the adoption of a step-son lay upon them who asserted it, and that a custom permitting the adoption of a person of a different gôt was not established.

Held, further, that the gift was not shown to be a valid alienation.

21st Feby. 1890.

ROE, J.—Both Courts have found against the fact of the adoption. It is urged that they have misinterpreted the deed, which does not assert that the adoption of Gurdit Singh took place when he was a child. But the Courts have not put this interpretation on the deed. What they say is that an adoption of a child may be recognized by custom, but that a mere recital by a deed that a man of sixty has adopted a stranger of forty cannot constitute a valid adoption.

In this view I think they are perfectly right. It is true that the general custom does not recognize all the restrictions of Hindu law as regards adoptions ; but it does require that there should be some sort of formal adoption. The deed in the present case is really a deed of gift, in which an adoption is merely recited. No doubt it is an expression of the executant's intention to adopt, and the executant himself repeats that intention in Court. The question is merely this : Can a sonless proprietor destroy the rights of his near collaterals—in this case his brother and brother's sons—by a mere declaration in

his old age that he has adopted a man of middle age, a stranger? It is admitted that there is no positive evidence that he can do this; but it is urged that there are published decisions of this Court (*Punjab Record* No. 58 of 1879, amongst others) which lay down the rule that there is no restriction as to age.

In the present case the inquiry as to custom has been very meagre. There is no extract from the *Wajib-ul-arz* or *Riwaj-i-am* with the file, and the Divisional Judge has not fully considered the question.

Notice may issue to respondent with a view to a further inquiry as to what the custom really is.

RIVAZ, J.—Mr. Justice Roe's order of the 21st February 19th April 1890. 1890 should be read with and as part of this order.

I think further inquiry is necessary before final orders are passed upon this appeal. I therefore remand the case (under Section 566, Civil Procedure Code) to the Court of the Subordinate Judge, Hoshiarpur, for a full inquiry and report upon the following issue—By the custom of Hindu Jats generally (and "Jaj" Jats in particular) of the Hoshiarpur tahsil, where a childless proprietor in his old age executes a deed of gift of his ancestral property in favour of a step-son, reciting therein that he has adopted him and also given possession of the property gifted, the said step-son being of middle age and a stranger or *ghair qaum*, and there being no proof that any previous ceremony of adoption has taken place, can the said deed be validly supported either as a deed of adoption or a deed of gift?

The Court should, of its own motion, summon the leading men of the tribe, and those witnesses most likely to be able to give information, and elicit from them such evidence as is available as to the custom. Vague oral opinions and assertions are of little value. Instances should be asked for, and if *primâ facie* in point, should be thoroughly tested and the facts of each cited case fully elucidated. If there are any *decided* cases in point, the files should be sent up. Extracts from any relevant provisions in the *Wajib-ul-arz* or *Riwaj-i-am* should also be placed with the record.

A return should be made within three months through the Divisional Judge, who is requested to favour this Court with his own opinion.

The judgment of the Chief Court was delivered by

28th April 1892. BENTON, J.—The suit is brought by a brother, nephews and grandnephews to have it declared that a gift made by the defendant, Mutsada Singh, in favour of his step-son, Gurdit Singh, shall not affect the plaintiffs' reversionary rights. The deed of gift contained an express statement that Gurdit Singh, now thirty-five years of age, had been brought up from childhood by the donor, supported, married and treated as a son, and that he was appointed by it sole heir, representative and adopted son. The donor is a man of about the age of sixty. The parties, save Gurdit Singh, belong to the Jaj gôt of Jats of the Hoshiarpur tahsil. Gurdit Singh belongs to a different gôt.

The defendants have two defences available,—one that Mutsada Singh was in any case competent to make the gift, and the other, that Gurdit Singh was validly adopted, in which latter case the plaintiffs would have no *locus standi*. These matters have been the subject of an exhaustive inquiry in accordance with an order passed in Chambers in this Court remanding the case for this purpose. The inquiry was made by a Commissioner for local inquiry. We have the opinion of the Commissioner, a Revenue Extra Assistant Commissioner, given in great detail in support of the validity both of the gift and the adoption. We have, on the other side, the opinion both of the District Judge and the Divisional Judge, after detailed examination of the inquiry, adverse to the defendants on both points.

The plaintiffs' suit had been decreed by the concurrent judgments of both Courts. We have heard the learned pleader, who appeared for the appellants in this Court, on his case as it is left by the further inquiry: we did not find it necessary to call on the respondents to reply.

The adoption was open to various objections set forth in the order of this Court ordering the further inquiry, as, for example, that the adoption rested on the deed alone unsupported by any ceremony; that the adoptive father was in old age; that the alleged adopted son was of middle age; and that he was a stranger or of a different gôt. Some of these objections may not be very serious, and we do not propose to discuss them, with the exception of the last, which appears to be unsupportable.

The *Wajib-ul-arz* has nothing special with regard to adoption, but it is of a very restrictive and exclusive character as regards alienation.

The *Riwaj-i-am* treats the subject of adoption with great fullness and lays down that the only persons of a different gôt who may be adopted are sister's sons and daughter's sons.

The learned pleader for the appellants contended that the defendant, Gurdit Singh, being a step-son was in itself no disqualification but rather something in his favour, and we may allow this assertion to pass without contradiction. The further contention, however, that it was for the defendants to prove the invalidity of the adoption of a step-son of a different gôt, is one which we are unable to accept, although authority might be quoted in support of it in cases decided a good many years ago. The subject is specially discussed in *Punjab Record*, No. 156 of 1890, in which case the person claiming to be adopted was a wife's brother's son, and we approve of the conclusion therein arrived at, that the burden of proving the validity of such an adoption is on those who assert it, and we follow the ruling and the authorities cited.

The defendants' case on this head we find is supported by one instance which is open to no objection, by another which may yet be disputed and disallowed, and by two in which it is doubtful whether the adopted son was of the same or of a different gôt. These instances are altogether insufficient to establish a custom permitting the adoption of a person of a different gôt, if we had no reliable record of custom as we have in the present case, and they are all the more inadequate when they are opposed to it.

As regards the gift, the *Wajib-ul-arz*, as we have said, is of a very exclusive and restrictive character, and in the present case no special circumstances are adduced which should induce us to regard the alienation as valid as being justified by necessity of any sort.

The result is that the appeal must fail, and is accordingly dismissed with costs.

Appeal dismissed.

No. 99.

APPELLATE SIDE. { MIRZA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
 { SAMDILI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 557 of 1891.

(FRIZELLE AND RIVAZ, JJ.)

Custom—Village menials—Sale of their houses by, without consent of proprietors.

Found, that in the village of Haria in the Bhera tahsil, Shahpur District, no custom was established permitting menials to sell their houses without the consent of the proprietary body.

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Rawalpindi, dated 9th January 1891.

Oertel, for appellants.

K. P. Roy and J. C. Basu, for respondents.

The question raised in this appeal was as to the right by custom of menials in the village of Haria in the Bhera tahsil of the Shahpur District to dispose of their houses without the permission of the proprietary body.

The judgment of the Chief Court, holding that no such custom was established, was delivered by

4th June 1892.

FRIZELLE, J.—One of the grounds on which this suit was dismissed by the Divisional Judge was that the plaintiffs, who are the three lambardars of the village, had no right to maintain the suit (a suit for possession of a house sold by Mochis to an Arora and by the Khatri to a Nai) as representatives of the other proprietors of the village. This plea was never taken by defendants, and even if it had been a good one, would not have justified the dismissal of the suit. We are of opinion also that it was not a good one, as whether or not plaintiffs sued on their own account only, they were entitled to assert whatever rights they themselves had as individual proprietors. It is argued for respondents that plaintiffs claimed the house as their own exclusive property, but on reference to the plaint we do not think this was their meaning. They relied on the *Wajib-ul-arz*, and never said that none of the other proprietors had any rights in the house, and even if they had meant to deny the rights of the other proprietors, the issue was raised of the power of village menials to sell their

houses without the consent of the proprietary body: the case was decided on this ground alone by the first Court, the Divisional Judge decided this issue also, and this Court must now also dispose of it. It is the real issue in the case, and we cannot agree with the opinion of the Divisional Judge that defendants have proved a custom at variance with the general custom and the *Wajib-ul-arz* of this village. Haria is no more than an ordinary village, although of large size and although a considerable number of non-proprietary Hindus reside in it. Many of the instances relied upon by defendants are recent, forced on most probably by the dispute in the present case, and in none of the other instances is it satisfactorily proved that the sales took place without the consent of the proprietors.

We reverse the decree of the Divisional Judge, and restore that of the first Court in plaintiffs' favour. Defendants to pay all costs.

Appeal allowed.

No. 100.

THAKAR DASS AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUHAMMAD BAKSH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 85 of 1891.

(STOGDON AND BULLOCK, JJ.)

Punjab Laws Act, 1872, Section 11—Pre-emption in sub-division of town—Muhalla Bhogi in town of Jagraon.

Found, that the right of pre-emption was not proved to exist in Muhalla Bhogi in the town of Jagraon.

If a town be composed of several sub-divisions, the fact that the custom of pre-emption is found to exist in one of such sub-divisions does not lead *per se* to the presumption that it exists in another.

Punjab Record, No. 165 of 1888 and No. 170 of 1889, referred to.

Further appeal from the decree of G. Leslie Smith Esquire, Divisional Judge, Umballa, dated 30th October 1890.

P. C. Chatterjee, for appellants.

K. P. Roy, for respondents.

This was a suit for pre-emption of a house situate in Muhalla Bhogi in the town of Jagraon.

The sole question for decision was whether the custom of pre-emption was shown to exist in the Muhalla, which was found to be a sub-division of the town within the meaning of Section 11, Punjab Laws Act, 1872.

The judgment of the Chief Court, finding the custom not established, was delivered by

30th May 1892.

BULLOCK, J.—This was a suit for pre-emption of a house which is described in the sale-deed as situated in Muhalla Bhogi in the town of Jagraon; and as to the first ground of appeal we have no doubt that the description of the locality is correct. There appears to be no quarter or sub-division of the town known as Muhalla Kikar Bazar: no such Muhalla was mentioned by the plaintiffs in the first Court,—the place was spoken of as a bazar,—and there is evidence showing that the Kikar Bazar is simply a street. It is urged that Muhalla Bhogi is too small to be considered a sub-division within the meaning of Section 11 of the Punjab Laws Act. The Act contains no definition of what a sub-division is, and the question is in each case one of fact. We think it established in the present case that the town of Jagraon contains sub-divisions, and that Muhalla Bhogi is one of them: it is a known and well recognised locality, consisting of an aggregate of houses, and it is not shown that there is any other or better defined sub-division than that of Muhallas. We consider then that Muhalla Bhogi is a sub-division within the meaning of the Act.

The question is, whether the custom of pre-emption exists in this sub-division? It has been found to prevail in other sub-divisions of the town, and it is argued that this fact raises a strong presumption that it exists also in the sub-division in which the house in suit is situated. Cases are cited in support of this contention, and among them *Punjab Record* No. 165 of 1888, No. 170 of 1889, and an unpublished case, No. 1258 of 1888. But we are unable to think that any presumption can be admitted in the face of the peremptory terms of Section 11 of the Act, which enacts that the existence of the custom of pre-emption shall not be presumed with regard to any sub-division of a town, and we do not see in what way the presumption arises *ex necessitate*. If a town be shown to be composed of sub-divisions, and if the custom may vary in them, the fact that it exists in one sub-division can hardly lead *per se* to the presumption that it exists in another. No doubt the existence of the custom in any other sub-division of a town is a relevant fact of which a

plaintiff may avail himself, but we do not think that it gives rise to a presumption which puts the onus of rebutting it on the defendant. The plaintiff must prove that the custom exists, in all cases where it is denied. This being our opinion, we have to decide whether the plaintiffs have proved the existence of the custom of pre-emption in the subdivision of Jagraon in which the house in suit is situated. We do not think that they have.

There is no instance of a claim to pre-emption having been enforced,—there is only a single instance of one having been preferred, and in that instance it was withdrawn: several cases of sale have been proved and the result has been as we have stated. The plaintiffs therefore cannot be said to have shown that the custom exists, and we dismiss their appeal with costs.

Appeal dismissed.

No. 101.

NAULA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,	} APPELLATE SIDE.
<i>Versus</i>	
MIAN KHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.	

Case No. 532 of 1891.

(STOGDON & BULLOCK, JJ.)

Custom—Gift by childless proprietor of a portion of undivided ancestral land to brother's son and brother's grandson—Jhurars of Sirsa tahsil.

Found, that a gift of a portion of undivided ancestral land by a childless Jhurar Jat (Mussalman) of Mauza Chora Khera in the Sirsa tahsil to his brother's son and brother's grandson was valid by custom in the presence of a brother and nephew of the donor.

Further appeal from the decree of W. O. Clark Esquire, Additional Divisional Judge, Ferozepore, dated 24th January 1891.

Shircore, for appellants.

Bates, for respondents.

The parties were Muhammadan Jhurar Jats (or Rajputs) of Mauza Chora Khera, a village in tahsil Sirsa. Mian Khan, defendant, a childless proprietor, made a gift of his $2\frac{1}{2}$ biswas share in the village to defendant 2, the son, and defendant 3 the grandson by another son of his elder brother Suba, whose widow he had married. The gift was contested by the plaintiffs, a brother and brother's son of the donor.

Held, citing the record of custom for the Sirsa District, that the gift was presumably valid, and it was for the plaintiff to prove that it was not valid.

The judgment of the Chief Court upholding the gift was delivered by

26th May 1892.

BULLOCK, J.—The question involved in this case is the validity of a gift of a portion of undivided ancestral land by a childless Jhurar of the Sirsa tahsil to his brother's son and brother's grandson, the latter of whom is a minor. The gift was a verbal one and is evidenced by mutation of names in the patwari's register. We agree in the finding of the original Court that no adoption of Sadik is proved, and there is also no sufficient proof, in our opinion, that the donees were brought up by the donor or were declared by him entitled to succeed as his heirs after his death. We think that there was no evidence of any intention to benefit the defendants earlier than the gift itself and its resulting mutation of names.

Assuming the correctness of *Punjab Record*, No. 107 of 1887, we observe that the rule does not appear to have any application to the part of the country with which this suit is concerned, and on referring to the original record of custom for the Sirsa District we find it stated as follows: "Every sharer in joint land may, without any consent on the part of his co-sharers, give a part of his own share to a near relation, but if he have no sons and any co-sharer be entitled, he cannot make a gift to a stranger with the object of injuring his co-sharer, and except as above set forth, he cannot make a gift of any part of joint land without the consent of the co-sharers." The result of this record is that a sonless proprietor may make a gift of part of his share, subject to the restriction that the gift be not a wanton one to a stranger for the purpose of injuring the contingent interests of any other co-sharer: it would, therefore, seem that only a co-sharer with contingent rights of succession to the donor can object. A co-sharer who possessed no such rights could not object, and in the present instance the admission of the defendants to share in Mian Khan's share of the joint property is justified by the record. The gift is proved, and the presumption is in favour of its validity: we therefore think that it was for the plaintiff to prove that it is not valid and he has not done so. We dismiss the appeal with costs.

Appeal dismissed.

No. 102.

RAMJI DAS AND OTHERS,—(DEFENDANTS),—
PETITIONERS,

Versus

MOKANDI LAL,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 343 of 1892.

(BENTON, J.)

Civil Procedure Code, 1882—Suit on foreign judgment—Enquiry into the merits of case in which the judgment was passed.

According to the Code of Civil Procedure, 1882, Section 14, as amended by Act VII of 1888, when a suit is instituted in British India on the judgment of a Court of a Native State in India, the Court in which the suit is instituted is not precluded from inquiry into the merits of the claim.

Petition for revision, under Section 622, Civil Procedure Code, of the decree of A. C. Marshall Esquire, District Judge, Umballa, dated 29th October 1891.

Lal Chand, for petitioners.

Bates, for respondent.

This was a suit to recover Rs. 39-15-0 rent of a shop situate at Jagadhri: the suit was brought on a foreign judgment, viz., on a judgment of the tahsil Court at Chachrauli in the Kalsia State. The defendants resided at Jagadhri in the Umballa District.

The District Judge, Umballa, overlooking the amendment of Section 14, Civil Procedure Code, 1882, by Act VII of 1888, held that "the rent of the shop was payable at Chachrauli; consequently that the cause of action arose there and the Kalsia Court had jurisdiction. The claim could not therefore be again tried before the British Court on the merits."

The judgment of the Chief Court reversing this decree and remanding the suit was delivered by

BENTON, J.—This was a suit brought on a foreign judgment, viz., on a judgment of the Kalsia State against persons residing at Jagadhri in the Umballa District. The District Judge of Umballa satisfied himself that the foreign Court had jurisdiction and he decreed the plaintiff's claim according to the decree, which had been dismissed by the first Court, after going into the merits. He goes on in his judgment to say: "The claim could not therefore be again tried before the British Court on its merits." In this he overlooks the last

10th June 1892.

paragraph of Section 14 of the Civil Procedure Code, which provides that the British Court is not precluded from inquiry into the merits as supposed.

I therefore accept this application and set aside the decree of the District Judge. I draw his attention to his power to inquire into the merits, and I request him to dispose of the case afresh in such manner as he may deem proper. The applicant will be allowed his costs in this Court, save the Court fee which will be refunded. The pleader's fee for the defendant will be Rs. 10.

Application allowed: cause remanded.

No. 103.

APPELLATE SIDE. {

THE MUNICIPAL COMMITTEE, DELHI,—(DEFENDANTS),
—APPELLANTS,

Versus

HAR PARSHAD AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 1141 of 1891.

(RIVAZ AND BULLOCK, JJ.)

Nuisance—Public latrine—Injunction—Act XIII of 1884, Section 68 (2) (a)—Statutory authority of Municipal Committee—Powers and duties of Committee.

In answer to a suit brought against the Municipal Committee of Delhi for an injunction to prevent, on the ground of nuisance, the use of a public latrine recently erected by the Committee, it was pleaded that the defendants were acting under statutory authority and that the alleged nuisance (if any) being a necessary consequence of the use of the powers and duties imposed on the Committee by the Legislature, could not be restrained by injunction.

Held, that the power claimed by the Committee under Section 68, sub-section (2) (a) of the Punjab Municipal Act, 1884, did not exist: that that enactment contained no express authorization to the defendants to construct public latrines. The section merely rendered it lawful for the Committee to apply their funds towards payment, *inter alia*, of the charges and expenses incidental to the construction, maintenance, improvement, cleansing and repair of latrines: it implied a discretionary power to construct public necessities, but it conferred no compulsory power to acquire land for the purpose of erecting such buildings thereon in any specific locality or at any place which might be deemed suitable by the Committee.

Punjab Record, No. 106 of 1888 (Lahore slaughter-house case) referred to and followed.

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Delhi, dated 15th June 1891.

Sinclair, for appellants.

P. C. Chatterjee, for respondents.

This was a suit instituted by certain persons who owned and occupied houses situate to the north and east of a public latrine erected at Delhi by the Municipal Committee of Delhi.

The main allegations of the plaintiffs were that the latrine had been constructed notwithstanding their objections : that the latrine was injurious to their health : that their houses had been rendered unfit for occupation : and that the Committee's arrangements for cleaning were bad. The plaintiffs accordingly prayed for a perpetual injunction against the further use of the latrine.

The material pleas of the defendants were that they had a statutory right to erect the latrine and that no suit lay against them : and that the plaintiffs had suffered no injury by the erection of the latrine, the arrangements of which were in good order.

The District Judge of Delhi (Mr. S. Clifford) held that the plaintiffs were entitled to have the latrine closed if it was a nuisance to them ; and he found upon the evidence that the latrine was in fact a nuisance and injurious to the health and comfort of the inmates of the plaintiffs' houses.

The District Judge accordingly gave the plaintiffs a perpetual injunction against the defendant-Committee directing them to close the latrine, so that it could not be used as such, or that they remove it.

The Committee appealed to the Divisional Judge, who, after a remand under Section 566, Civil Procedure Code, to enable the plaintiffs to show that the defendants possessed a site which would serve the public purpose for which the latrine was intended and not be open to the same objections as the present one, maintained the decree of the District Judge.

The Committee then preferred a further appeal to the Chief Court contending that :

- (1). No case was made out by the plaintiffs for the grant of a perpetual injunction against the defendant-Committee.
- (2). There was no evidence of any better site than that suggested.

- (3). The Committee were acting under their statutory authority and the absolute discretion of selecting a site was in them.
- (4). The alleged nuisance being a necessary consequence of the use of the powers and duties imposed upon the Committee by the Legislature, could not be restrained by injunction.

The Chief Court concurred with the finding of the lower Courts that the building in question was a nuisance and that it materially interfered with the plaintiffs' physical comfort: and that the Municipal Committee had failed to show statutory authority for the creation of the nuisance as a necessary incident to the use of the building,—Section 68, sub-section (2) (a) of the Punjab Municipal Act, 1884, containing no express authorization to the Committee to construct public latrines, but merely rendering it lawful for them to apply their funds towards payment, *inter alia*, of the charges and expenses incidental to the construction and maintenance of latrines.

The judgment of the Court was delivered by

11th July 1892.

BULLOCK, J.—This is an appeal from an order of the Divisional Judge of Delhi affirming a decree of the District Judge, which directed the issue of an injunction perpetually restraining the Municipal Committee of Delhi, the defendants, from permitting continuance of the use of a certain building as a public necessary.

The plaint alleged that the defendants have recently constructed a public latrine within a few feet of the plaintiffs' houses, and that the same has been used, and at the time the suit was brought, was being used, as a latrine by the general public: that the said erection is a nuisance, and that the plaintiffs are endangered thereby. They therefore prayed abatement of the nuisance by the issue of an injunction to restrain the defendants as described above. The defendants denied that the building is a nuisance to the plaintiffs, and pleaded statutory power to construct and use it as a public latrine.

Upon the first point, we have no hesitation in finding that this building is a nuisance *per se*, and that the use of it materially interferes with the physical comfort of the plaintiffs and others who occupy their house: the evidence is amply sufficient for this finding, and there is no necessity to set it out in detail. This being so, the appellants in order to succeed in their appeal

must show statutory authority for the creation of the nuisance as a necessary incident to the use of the building. If they are able to show that the nuisance is a necessary consequence of the use of the building for a purpose expressly authorized by the Legislature, then, as was decided in *The London Brighton and South Coast Railway Company v. Truman and others*, 55 L. J. Ch., 354, they are protected against restraint by injunction. For the power claimed for the defendants, we are referred by their learned Counsel to Section 68 (2) (a) of the Municipal Act (XIII of 1884). That enactment, however, contains no express authorization to the defendants to construct public latrines: it merely renders it lawful for them to apply their funds towards payment, *inter alia*, of the charges and expenses incidental to the construction, maintenance, improvement, cleansing and repair of latrines: it implies a discretionary power to construct public necessities, but it confers no compulsory power to acquire land for the purpose of erecting such buildings thereon in any specific locality or at any place which may be deemed suitable by the Committee. It is, however, urged that, having regard to all the circumstances, the section should be interpreted as giving authority to the Committee to construct latrines for the use of the public. Upon this point we may refer to the remarks of Lord Blackburn in the case above cited, which are as follow:—"I do not think there can be any doubt that if on the true construction of a Statute it appears to be the intention of the Legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages or an injunction to prevent the continued proper exercise of the powers, effect must be given to the intention of the Legislature." Applying this rule, we can find in the Municipal Act no element of compulsion or any indication of an intention to interfere with private rights: nothing more can be deduced from its provisions than an implication of permissive power to construct latrines; but there is nothing in the Act which can be construed as an authority to do this, whether the necessary consequence be a nuisance or not. The case resembles that of *The Managers of the Metropolitan Asylum District v. Hill and others*, 50 L. J., Q. B., 353. In that case the plaintiffs prayed an injunction against the use of a certain plot of land and buildings upon it as a hospital for small-pox or other contagious diseases in such manner as to

create a nuisance to the plaintiffs: no express provision in the Act applicable to the subject was to be found authorising the erection of a hospital, but it gave authority for expenditure from a fund for the maintenance of patients in any Asylum specially provided under it for patients suffering from small-pox. It was agreed that, where the doing of a thing is authorized by the Legislature and the discretion given in the manner of doing it is exercised in a reasonable way, the persons exercising it are not liable though damage result to an individual. But it was held that the Act did not necessarily require anything to be done which might not be done without causing a nuisance; and that as to acts which might or might not be done, there was no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done, if they were done at all, somewhere and under some circumstances without creating a nuisance; and lastly, that the Legislature had manifested no intention that the optional power should be exercised at the expense of, or so as to interfere with, any man's private rights. These remarks apply with full force to the case before us: there is nothing mandatory or imperative in the terms of the Municipal Act with reference to the construction of public necessities: the Committee has a discretion independent of the Act whether it will build such places or not; but no compulsory power to build is conferred upon it by the Act, which does not define any place at which the establishment of such a building is made lawful, and does not authorize any interference with private rights. It is clear then that the defendants had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent. The order of the Divisional Judge dismissing the appeal to his Court must therefore be confirmed, though it was based upon entirely erroneous reasons; and we think it right to say that it is not a little singular that in dealing with this matter neither the District nor the Divisional Judge gave his attention to the case decided in this Court and reported as *Punjab Record*, No. 106 of 1888: a consideration of that case would have materially assisted the Courts in ascertaining the proper principles applicable to the question before them.

The appeal is dismissed with costs.

Appeal dismissed.

No. 104.

SHERA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

BUTA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 43 of 1890.

(BENTON & RIVAZ, JJ.)

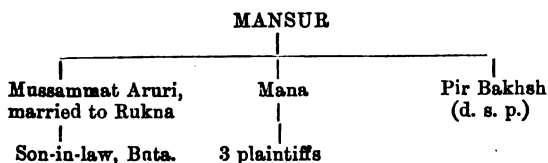
Custom—Alienation—Absence of necessity—Childless proprietor—Arains, Lahore District.

Found, in a suit the parties to which were Arains of the Lahore District, that a childless proprietor is subject to the ordinary rule restricting alienation to cases of necessity, and that the alienation in the present case was therefore invalid.

Further appeal from the decree of Lieut.-Col. H. M. M. Wood, Divisional Judge, Lahore, dated 23rd December 1889.

This was a suit to contest an alienation of 72 kanals 7 marlas of land situate in mauza Boh in the Kasur tahsil of the Lahore District.

The parties were Arains, related to each other, as follows:—



The plaintiffs claimed to set aside a sale by Mussammat Aruri and Pir Bakhsh of land in which they had one share each, in favour of Bata, Aruri's son-in-law, on the ground that Pir Bakhsh being a sonless proprietor had no power to alienate, and that Aruri had no power to do so except for necessity which did not exist.

The first Court found that by custom Pir Bakhsh was competent to alienate for necessity and with the consent of the collaterals, and that part of the plaintiffs' suit was dismissed. The alienation by Mussammat Aruri was held to be invalid.

The Divisional Judge found that the evidence as to necessity was perfectly reliable and that the decree against Mussammat Aruri must be set aside: the decree as regards the alienation of Pir Bakhsh's share was confirmed, the result being that the whole suit stood dismissed.

Upon further appeal by the plaintiffs, the Chief Court, after examining the evidence, concurred with the first Court that the necessity for the sale to Buta was not proved, and that as regards the alienation by Mussammat Aruri, the plaintiffs were entitled to succeed.

Before disposing of the case as regards the alienation by Pir Bakhsh, an order of remand was made under Section 566, Civil Procedure Code, for an inquiry as to the powers of childless proprietors of the Arain caste to alienate.

The return made to the remand was to the effect that childless proprietors among Arains in the Lahore District were subject to the ordinary rule restricting alienation to cases of necessity.

The order of remand and the judgment upon return being made thereto, was delivered by

5th January 1892.

BENTON, J.—The plaintiffs are the nephews of the defendant Pir Bakhsh and of Rukna, deceased, who was the husband of Mussammat Aruri. The suit was brought to obtain possession of 72 kanals 7 marlas of land which Pir Bakhsh and Mussammat Aruri had united to sell, or to pretend to sell, to Mussammat Aruri's son-in-law, Buta, the defendant.

Both Courts have found that the defendant Pir Bakhsh had full power of alienation and they agreed in dismissing the claim so far as his half share of the land was concerned. The first Court found that there was no necessity for the alienation, being of opinion that it was merely an arrangement for benefiting Mussammat Aruri's son-in-law. It indicated that it would have been of a different opinion on the evidence which was led if the alienation had been to a stranger. The Divisional Judge did not regard the matter in the same light. He thought that what would have been good [proof] if the alienee had been a stranger should not be considered bad because he was a son-in-law. He accordingly set aside the decree as against Mussammat Aruri as well.

We may observe that as regards either defendant the plaintiffs are not entitled to immediate possession in any case, but only to a decree that the disputed alienation shall not affect their reversionary rights.

We have examined the evidence with regard to necessity, and we arrive at the same conclusion as the first Court. We think that the evidence of the witnesses Khushal and Atu is false, and that the book produced to substantiate the necessity

of the sale to Buta has been fabricated. We are thus in a position to dispose of the case as regards Mussammatt Aruri.

Pir Bakhsh's case is on a different footing. The parties are Arains of the Lahore District, and there is strong reason for supposing that as regards the power of alienation the rule applicable to them is not different from that generally prevailing in the central districts of the Punjab. The oral evidence with regard to the point is exceedingly meagre and conflicting. The *Wajib-ul-arz* of the village seems to assign to the proprietors of the village an absolute power of alienation, but it is doubtful whether this was the real intention, or whether it meant only to provide for pre-emption. Even if this were found to be its real intention, we should be very much disposed to doubt whether it gave the rule correctly.

Under the circumstances, we think proper to remand the case under Section 566 of the Civil Procedure Code to the first Court for a careful inquiry as to the powers of childless proprietors of the Arain caste to alienate, *i.e.*, whether it is an absolute unrestricted power, or whether they have only a power of alienation for necessity. Instances of alienation without necessity should be searched for, and disputed cases, if any such there be, should be examined. Respectable members of the caste should be examined on the subject. The return will be made through the Divisional Judge, who will be good enough to see that the inquiry is complete and to favour this Court with his opinion. It should be re-submitted in three months.

BENTON, J.—A return has been made to the order of remand of the 5th January 1892. No objections have been filed to the return, but nevertheless we have heard the pleader for the respondents, to whose clients it is unfavourable, against it. 8th June 1892.

The inquiry has been made with great fulness and at a great expense of time and trouble. It discloses that the *Riwaj-i-am* prepared expressly for Arains is in direct opposition to the *Wajib-ul-arz* of the village giving childless proprietors an absolute power of alienation. The men of influence who were examined gave evidence strongly corroborating the rule laid down in the *Riwaj-i-am*, which is the ordinary rule that childless agriculturists may not alienate to disappoint the expectations of their collaterals without their consent, save for necessity. A few cases no doubt have been brought to light in which alienations have been made by childless

proprietors without necessity and have not been set aside, but it is said that the circumstances were peculiar and that there were special reasons why these cases were not contested. The instances moreover are very few and entirely insufficient to serve as the basis of a rule of custom opposed to the one so generally prevalent.

We accordingly find in accordance with the return and the opinions of both the Courts below, that childless proprietors among Arains in the Lahore District are subject to the ordinary rule restricting alienation to cases of necessity and that the alienation by the defendant Pir Bakhsh is invalid.

We therefore accept the plaintiffs' appeal and we grant them a decree for possession of the land which belonged to Pir Bakhsh, and, as regards the land held by the widow Musammatt Aruri, a decree declaring that the sale of the 9th January 1888, impugned in this suit, shall not affect prejudicially their rights as reversioners. We also allow the plaintiffs their costs in this Court and in the Courts below.

Appeal allowed.

No. 105.

APPELLATE SIDE.

{ ARBEL SINGH AND HARNAM SINGH,—(DEFENDANTS),—
APPELLANTS,

Versus

BAJ. SINGH,—(PLAINTIFF),—RESPONDENT.

Case No. 1009 of 1890.

(FRIZELLE & BENTON, JJ.)

Custom—Succession to office of mahant—Dharmasala Thakar Bhawa Singh, Amritsar—Nomination of successor—Approval of brotherhood.

In a suit regarding the succession to the office of mahant of the dharmasala of Nirmla Sadhs, known as Thakar Bhawal Singh, situate outside the city of Amritsar, held, that by custom the rule of succession was that the mahant may nominate his successor, but that the nomination will not prevail unless the brotherhood formally approve the appointment.

If there be no nomination, then the brotherhood meet and formally appoint.

If the mahant misconducts himself, the brotherhood have the power to dismiss him.

The brotherhood strictly speaking are those connected by spiritual ties with the founder of the institution, although it apparently may be held to include also the whole sect who are also related to each other by spiritual ties.

Punjab Record, No. 37, of 1891, referred to.

First appeal from the decree of Carr Stephen Esquire, District Judge, Amritsar, dated 21st January 1890.

Madan Gopal, for appellants.

J. C. Basu, for respondent.

This was a suit to obtain possession of a dharmsala, known as Thakar Bhawal Singh, situated outside the city of Amritsar near the Ghi Mandi darwaza.

The plaintiff alleged that the last mahant was his gurbhai, Khazan Singh, and that as the gurbhai of the last mahant and also as the elect of the *Bhekh* of his fraternity after the death of one Narain Singh (a nephew of Khazan Singh who had meanwhile succeeded his uncle as mahant) he was again nominated mahant. The plaintiff therefore sought to recover possession of the dharmsala and the property attached thereto.

The defendants' pleas had reference to questions of fact.

The lower Court decreed in favour of the plaintiff that he was the mahant of the dharmsala and entitled to possession accordingly.

The defendants appealed to the Chief Court. Nothing appearing in the record as to the rule of succession applicable to the case, the Chief Court made an order of remand to ascertain the rule of succession according to the custom applicable to the institution in question; and with whom the power of appointment rested.

The return made was in favour of the plaintiff and is sufficiently stated in the judgment.

The order of remand and the judgment of the Court was delivered by

BENTON, J. (RIVAZ, J., concurring).—The defendants-appellants have been permitted to appeal as paupers against a decree of the District Judge of Amritsar, declaring that the plaintiff Baj Singh is the mahant of the dharmsala, known as that of Thakar Bahawal Singh, situated at Amritsar, and granting him possession of all the property, moveable and immoveable, which was sued for, found to be of the value of Rs. 6,504. According to the judgment, the decree should have been declaratory merely, but the plaintiff prayed for possession and any other relief that might be thought proper, and the terms of the decree prepared in English is that "the plaint is decreed with all costs."

The plaintiff Baj Singh in his plaint gave a long rambling account of the tenure of the office of mahant of this dharmsala in recent years. According to it, the plaintiff appears to recognize Khazan Singh as the last duly appointed mahant prior to himself, saying that he himself got him appointed by waiving his own claim in his favour. Khazan Singh died, he says in the plaint, in October 1885. He does not recognize either of the two persons who have pretended to hold the office since then. These persons were, first, Narain Singh, who was appointed by Khazan Singh under a will executed under undue influence, and then there was a pretended appointment of the defendant, Harnam Singh, by a will dated 13th December 1887, which was invalid because Narain Singh was then a minor, and for other reasons.

Plaintiff's suit was brought, according to the plaint, eight months after the death of Narain Singh, and he based his claim on the fact that he was gurbhai of Khazan Singh, and that he had been appointed, at a date then unspecified, mahant by the Sadhs and mahants, or, as we may understand, by the brotherhood. His pleader stated that this appointment took place on the 3rd August 1888, and he maintained that, if it were not valid, still the plaintiff was entitled to the succession as Khazan Singh's gurbhai. He objected to the defendant, Arbel Singh, that he was not a chela of Khazan Singh; that he belonged not to the Nirmla sect of mendicants but to that of the Udasis, and that he was a married man; and that for both these reasons he was disqualified.

The defendants denied the alleged election on the 3rd August 1888 by the brotherhood. They denied that the plaintiff was gurbhai of Khazan Singh or chela of Dal Singh, or that he was appointed to succeed to a former mahant, Partap Singh. They maintained that any claim to the succession he might have had was lost when he did not succeed Partap Singh. The defendants maintained that the appointments of Narain Singh and Harnam Singh by wills of the previous mahant were valid appointments, and that if Harnam Singh's appointment were not valid, the plaintiff had no title to succeed in presence of Arbel Singh, chela of Khazan Singh and gurbhai of Narain Singh. They admitted that Arbel Singh was not a celibate, but they maintained that celibacy was not a necessary qualification.

The lower Court has found that the appointment of Narain Singh by Khazan Singh's will was a valid appointment but that Narain Singh never executed any will in favour of Harnam Singh, and that it would not have been valid if he had. It has held that the plaintiff, there being no nomination by the mahant, was validly elected by the brotherhood as being a chela,—whose chela is not stated.

The issues which were drawn by the lower Court appear to be altogether inadequate for the proper decision of the case, and there has accordingly been no proper inquiry. The plaintiff, in order to be entitled to succeed, was bound to state the rule or rules of succession and to prove them, and then to show that these rules indicated him as the proper successor. Throughout the record, the rule of succession has nowhere been stated, nor has there been any inquiry to determine what it is.

In argument in this Court it was alleged for the plaintiff that the rule of succession was that the mahant may nominate, but the nomination is subject to confirmation by the brotherhood. In the case of there being no nomination, the brotherhood have full power to appoint any one, whether he was chela of the last incumbent or not, but he must be unmarried. The election might be held anywhere.

On the other hand, the defendant's pleader alleged that the mahant had power to appoint without reference to the brotherhood. If he made no appointment, then the brotherhood assembled at the institution were at liberty to elect to the office a chela of the last mahant, if there were any such, and if not, then somebody else. It will thus appear that the parties are at issue with regard to the rule of succession which must be established after due inquiry.

The case is remanded to the lower Court for inquiry into the whole question of the succession, *de novo*, save that any evidence already recorded may stand, unless it be desired to examine the witnesses afresh on any point.

The issues to be tried are —

1. What is the rule of succession to the office of mahant according to the custom applicable to the institution in all its details, as indicated in the statements of it given above, or as they may appear at the trial? With whom does the power of appointment rest? With the mahant or with the brotherhood, or partly with the former and partly with the latter? Who constitute the brotherhood &

2. Is the plaintiff entitled to succeed as mahant according to the rule as found in accordance with issue No. 1, and has he all the necessary qualifications?
3. Did Narain Singh rightfully hold the office in accordance with the said rule?

We have not heard the parties with reference to the property in dispute. It may accordingly be assumed that the inquiry already held in regard to it is sufficient. The case will be returned to this Court with findings on the above issues in three months.

9th July 1892.

BENTON, J.—A return has now been made to the order of the 8th January remanding the case for inquiry on certain points. An objection to the return has been filed by the appellant, and we have heard his counsel on the further inquiry and also on all the evidence bearing on it.

As regards the rule of succession, the finding is that the mahant may nominate his successor, but the nomination will not prevail unless the brotherhood formally approve of the appointment. If there be no nomination, then the brotherhood meet and formally appoint. If the mahant misconducts himself, the brotherhood have the power to dismiss. The brotherhood strictly speaking are those connected by spiritual ties with the founder of the institution, although it apparently may be held to include also the whole sect who are also related to each other by spiritual ties.

The lower Court has held that the plaintiff is entitled to succeed, as having been duly elected by the brotherhood to succeed Khazan Singh, the appointment of Narain Singh not being valid as being without the sanction of the brotherhood and the nomination being by a will executed while Khazan Singh was not competent. Narain Singh had no power to appoint a successor, and he has been in bad health since appointed and under the influence of his father whose sole object is to aggrandize his own family.

We are not quite sure that Narain Singh was not duly appointed in consequence of the will and the acceptance of the brotherhood. Khazan Singh died in 1885 apparently, while Narain Singh died in the early part of 1888. In the interval there was no dispute and plaintiff's alleged appointment by the brotherhood did not take place until August 1888. The plaintiff did not challenge the appointment of Narain Singh; there is evidence that it was sanctioned by a meeting of the brotherhood and the brotherhood did not take up the matter in plaintiff's

favour until after Narain Singh's death. This view of the matter is not in conflict with the finding of the District Courts, that the sanction to the appointment rests with the brotherhood and that a mahant may not be appointed by the incumbent without reference to the brotherhood.

It follows, however, from this view of the matter that the appointment of Harnam Singh, which rests on Narain Singh's will alone, cannot be regarded as valid.

With regard to the rule of appointment and succession, which has been found by the District Judge as stated above, we think that it is in full accord with the evidence, regarded as a whole. Several of the witnesses who gave the evidence are respectable mahants in charge of dharmshalas in and about Amritsar. Their evidence as to the rule of appointment goes to curtail their own power, and we think the lower Court rightly regarded it as genuine evidence. The fact of the meeting which appointed the plaintiff has not been so clearly brought out as it might have been. The witnesses stated that the brotherhood assembled at another dharamsala, a mile away, and agreed to the appointment. They do not give details as to the persons who were present, but it was rather for the other side to cross-examine and bring out these details than for the plaintiff, if they thought that they could prove the broad assertion false. There was hardly any cross-examination save in one instance.

Our attention has been drawn to the case reported as *Punjab Record*, No. 37 of 1891, which also was one of *Nirmala Sadhs*. It was there ruled with regard to an institution in the Ferozepore District, that an appointment by a mahant was not bad, because a gurbhai did not assent to it. This finding is not opposed to the conclusion we now arrive at, which is that appointment rests with a majority of the brotherhood. Moreover, institutions in different districts may be governed by different rules. The weight of evidence in the present case distinctly establishes that the plaintiff was duly appointed in accordance with the rules applicable to institutions like the one in dispute at Amritsar, of which there are said to be thirty or forty.

We therefore dismiss the appeal with costs, and we direct that the attention of the Collector of Amritsar be drawn to the decree with a view to the realisation of the costs which should be paid by the pauper defendants.

Appeal dismissed.

No. 106.

NUR MUHAMMAD AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

APPELLATE SIDE. }

Versus

GHULAM HABIB AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 431 of 1890.

(BENTON & RIVAZ, JJ.)

Muhammadian shrine, Dera Ismail Khan District—Succession to land and offerings—Alienation—Religious office.

J. M., who died about a year before suit, was owner of half the land attached to the Shah Habibwala khangah in the Dera Ismail Khan District and was entitled to a half share in the management and offerings of the shrine: he settled this property on N. M., his sister's son, on condition that he (the grantor) should receive maintenance during his lifetime.

The plaintiffs, members of the family and related to J. M. in the fourth degree (computed in accordance with the opinion expressed in *Punjab Record*, No. 126 of 1890) were entitled to a two-thirds share of the other moiety of the management and offerings, sued to set aside the above arrangement on the grounds (1) that the property was *wakf*, and (2) that J. M. was not competent to make the alienation.

Held, that by custom the plaintiffs were entitled to inherit the share in the management and offerings in preference to N. M., a sister's son, his place being after collaterals related in the fourth degree.

Held, also, that assuming that J. M. as proprietor could alienate only for necessity, there appeared to be satisfactory reasons for holding that the alienation of the land was justified by necessity. The land was simply heritable property unconnected with the shrine, save that hitherto both had belonged to the same people.

Held, also, that the shrine must be regarded as a religious institution of a sort. It could not be regarded as *wakf*, it being nowhere laid down that a mausoleum raised to a saint is to be so treated. The succession to the superintendence and management of the shrine are to be determined by the rules and customs which have hitherto been applied to the particular institution, as in other like cases.

Held, further, that the transfer of a share in the shrine and the offerings was akin to the transfer of a religious office and was invalid. I. L. R., 6 Mad., 76, referred to and followed.

Further appeal from the decrees of H. B. Beckett, Esquire, Divisional Judge, Derajat, dated 23rd December 1889.

P. C. Chatterjee and K. P. Roy, for appellants.

Oertel and Bates, for respondents.

This was a suit for a share in (1) the land which had heretofore been held by the family which had held charge of the Shah Habibwala khangah in the District of Dera Ismail Khan; (2) a share in the management and offerings of the shrine.

One of the family, Jan Muhammad, was possessed of half the land in question and was also entitled to a half share in the management and offerings of the shrine: this he settled on Nur Muhammad, his sister's son, on condition that he (the donor) should receive maintenance during his lifetime.

The plaintiffs, who had a two-thirds share in the other moiety of the land and offerings, sued to contest this arrangement on the ground that the property was *wakf* and that Jan Muhammad was not competent to make the alienation.

The lower Courts disallowed the plaintiffs' claim in respect of the land, the Divisional Judge remarking, the land "has nothing to do with the tomb." * * * "The case of the offerings and of the well land are quite separate." Both lower Courts held that the offerings were *wakf*. "It is admitted" said the Divisional Judge "that the shrine is *wakf* and "the offerings are attached to it and cannot be separated," and the plaintiffs obtained a decree accordingly for the share claimed in the offerings.

The defendants preferred a further appeal to the Chief Court and the plaintiffs filed a cross-objection under Section 561, Civil Procedure Code.

The judgment of the Court was delivered by

BENTON, J.—The suit has reference to a shrine known as 19th April 1892. Shah Habibwala khangah and certain land which has heretofore been held by the family which has held charge of the shrine, viz., the descendants of Musa, Khalifa of the saint Habib. One of the family, Jan Muhammad, who died a year before suit was brought, was possessed of half the land in question and was entitled to a half share in the management and offerings of the shrine, and he settled this property on Nur Muhammad, his sister's son, on condition that he should himself receive maintenance during his lifetime. The plaintiffs, who are members of the family entitled to a two-thirds share of the other half share of the land, and to two-thirds of the other half of the management, sue to set aside this arrangement on the ground that the property is *wakf*, and that Jan Muhammad was not competent to make the alienation and they claim possession. Their

claim has been disallowed in respect of the land and decreed in regard to the interest in the shrine. The defendant appeals against the decree in so far as it is unfavourable to him, and there is a cross-objection by the plaintiffs in respect of the agricultural land.

The Divisional Judge held that the land was quite distinct from the shrine and that it was not *wakf*, while the shrine and the offerings were property of this character. He therefore dismissed the appeal to him against the decree of the District Judge which gave the plaintiffs two-thirds of the half share of the shrine and offerings, but dismissed their claim in regard to the land.

The information we have regarding the shrine and the land is scant, but still it is valuable for the purpose of determining the nature of the property in dispute. We learn from the Settlement Record that Shah Habib came to the village seven generations back; that he was a man held in great respect; and that the proprietors gave him the land in dispute that he might settle on it and reside amongst them. He did so, and in course of time died. He bequeathed it to his Khalifa, Musa, whose family, and those who held him in respect, then raised the tomb to him. The persons who held him in reverence continued to bring offerings and present them at his tomb. These offerings have been enjoyed hitherto by his heirs according to the pedigree table, which goes as far back as the fourth in degree from Jan Muhammad. Jan Muhammad and the plaintiffs are both descended from this ancestor.

It is obvious from this account that when the land was given to Shah Habib, there was and could be no question of its appropriation to support the shrine. That land is simply heritable property unconnected with the shrine, save that hitherto both have belonged to the same people. The finding of the Divisional Judge as regards this property is therefore correct.

The shrine, we think, must be regarded as a religious institution of a sort. We cannot see that it should be regarded as *wakf*. It is nowhere laid down that a mausoleum raised to a saint is *wakf*. The succession to the superintendence and management of the shrine must be determined by the rules and customs which have hitherto been applied to the particular institution, as in other like cases. The rule of succession hitherto has obviously been that the Khalifa's descendants have succeeded to a share of the offerings and of the management

just as if it had been ordinary property. For the defendant, it was maintained that the shrine was merely heritable property subject to a trust, and that as such it was capable of alienation subject to the trust. We are unable to accept this view of the matter.

Apart from the question of the nature of the property dealt with, which has just been discussed, the following questions arise on the appeals of the parties—

1. Whether in accordance with custom the plaintiffs are entitled to inherit in preference to the defendant, the sister's son ?

2. Should this be decided in the plaintiffs' favour, there is next the question with regard to the agricultural land, whether Jan Muhammad was competent to make the transfer ?

3. Whether he was competent to transfer a share of the management with a right to a share in the offerings to his sister's son ?

4. Whether the plaintiffs are precluded from objecting to the alienation, because they had already themselves taken an alienation by way of mortgage from Jan Muhammad which has been redeemed by the defendant ?

With regard to the first matter, we find on examining the *Riwaj-i-am*, which is accepted by both parties as containing the proper rule of succession, that the plaintiffs are entitled to succeed in preference to the sister's son. His place is after collaterals related in the fourth degree. We consider that this describes the plaintiff's relationship in accordance with the correct computation as laid down in *Punjab Record*, No. 126 of 1890, as the common ancestor is the fourth in ascent, counting from Jan Muhammad. We see no reason for holding that the rule of computation is inapplicable in the present case, as contended for the plaintiffs.

The question of an ordinary proprietor's competency to alienate has not been discussed in the Courts below, and this would be a good reason for not allowing it to be taken up now, there being no sufficient materials on the record for dealing with it. Assuming, however, that Jan Muhammad, as proprietor, could alienate only for necessity, there appear to be satisfactory reasons for holding that the alienation of the land was justified by necessity. The property was already burdened and he was in difficulties. In all probability in settling the land on the defendant, he only made a reasonable provision for paying off his debts and meeting his future wants.

As regards the transfer of a share in the shrine and the offerings, it is clear that the transfer amounted to a transfer of an office, in which the deceased Jan Muhammad was associated with others of the same descent as himself, along with a fund to be managed, which afforded him and his associates emolument for their trouble. The office was a hereditary one. It could not be efficiently discharged by any save those who on account of their descent might be supposed to be influenced by affection and reverence for the saint of their ancestors. The prosperity of the institution may be regarded as dependent on proper management, and such management could not be anticipated if aliens of any caste or creed were associated with the members of the family who hitherto had the management. There was no objection from this point of view to the mortgage to the plaintiffs, and no conclusion in favour of the power of alienation to a stranger or a member of a different family is to be drawn from it. The transfer was not, as maintained by the plaintiffs, of mere heritable property burdened with a trust. In support of this contention 10 W. R., 299, was quoted, as well as *Amir Ali on Muhammadan Trusts*, 351, but the report of the case referred to is too meagre to enable any conclusion to be safely founded on it. It was held by the Privy Council in L. R., 4 Ind. App., 76 (*Raja Vurmah Valia v. Ravi Vurmah Mutha*) that the sale of a religious trust was illegal and that there could be no valid custom qualifying the principle that such trusts are unsaleable. It is true that this is not a case of a trust but of a religious office, but it appears that the same principle applies, and this was the view taken by the Madras High Court in the case reported at I. L. R., 6 Mad., 76, which seems to us to be a case exactly in point. It lays down that the sale of a religious office (which we regard the present transaction as regards the offerings to be in effect) to a person not in the line of heirs, though otherwise qualified for the performance of the office, is illegal. The previous history of the institution shows that no such transfer has been admitted. The non-existence of any such instances appears not to be due to accident, but to be based on sound principles necessary to the harmonious management of the institution and its prosperity.

We accordingly affirm the decree of the lower Court, although with regard to certain points on grounds somewhat different. As both sides fail in their appeals, the appeals are dismissed with costs.

Appeal dismissed.

No. 107.

PIR BAKSH, — (DEFENDANT), — APPELLANT,

Versus

ISA AND OTHERS, — (PLAINTIFFS), — RESPONDENTS.

} APPELLATE SIDE.

Case No. 710 of 1890.

(BENTON & RIVAZ, JJ.)

Custom—Khanadamad—Appointment of, to succeed to estate of sonless proprietor—Arains of tahsil Zira, Ferozepore District.

Found, in a suit the parties to which were Arains of tahsil Zira in the Ferozepore District, that according to the custom of the tribe a khanadamad may be appointed to succeed to the estate of a sonless proprietor to the exclusion of his brother and nephews.

Further appeal from the decrees of Lieutenant-Colonel H. J. Lawrence, Divisional Judge, Ferozepore, dated 23rd April 1890.

Oertel, for appellant.

This was a suit to recover possession of 26 kanals 9 marlas of land situate in mauza Rarwan, tahsil Zira in the Ferozepore District, the parties being Arains.

The land was owned by one Lehna, the uncle and brother, respectively, of the claimants. Lehna died without a son, and, according to the plaintiffs, his widow remained in possession of the property. She also died six years before suit when the land was submerged by the river. The plaintiffs further alleged that two years prior to suit the land had re-appeared from the river; that the defendant had forcibly taken possession of it, and had been recorded as proprietor in the revenue papers. The plaintiffs accordingly sued for possession.

The defendant pleaded that the land in dispute formed part of the land owned by Lehna, his maternal grandfather, who had adopted him and brought him up as a son; that after Lehna's death his widow came into possession of the property and that she had gifted the whole of the land to the defendant by a registered deed of gift, and that mutation of names had also been effected in his favour.

The first Court found in favour of the defendant and dismissed the plaintiffs' suit with costs.

The Divisional Judge held in appeal that the property in suit was not included in the gift by Lehna's widow, and decreed the plaintiffs' suit.

The defendant preferred a further appeal to the Chief Court. In admitting the appeal to a Bench, Sir Meredyth

Plowden recorded the following interlocutory order: "Pir Bakhsh was the daughter's son by Rukna who was *khanadamad* of Lehna. The intention of the gift was to confirm "the title of Pir Bakhsh as heir of Lehna, and I think that intention may be given effect to notwithstanding that the words of "the gift were limited to the land then above water."

The Chief Court made an order of remand under Section 566, Civil Procedure Code, and the return made was that according to the custom of the tribe (Arains) a *khanadamad* may be appointed to succeed to the estate of a sonless proprietor, and that the defendant's father was so appointed.

The order of remand and the judgment of the Court was delivered by

1st Decr. 1891.

BENTON, J.—This is a consolidated appeal in two suits instituted on the same day in the same Court, *viz.*, that of the Munsif of Zira and disposed of by one judgment by the Divisional Judge. There was also a third suit based on the same cause of action and instituted like the other two in the same Court and at the same time. This was an unclassified suit being for a house in a village of less value than Rs. 100. The appeal lay to the District Judge, but it was disposed of by the Divisional Judge along with the other two and in the same manner. The Divisional Judge in all three suits set aside the Munsif's order. In the unclassified suit no further appeal lies under Section 40 (last clause) of the Punjab Courts' Act. This last case accordingly, if it be dealt with at all, must be disposed of in revision.

The plaintiffs are the nearest collaterals of one Lehna, who died many years ago leaving a widow and a daughter's son, the defendant. The suits are for property, which it appears must be regarded as a portion of the estate of Lehna. The agricultural land in suit is land which was in the river until it came out two or three years ago.

The defendant claimed the agricultural land and also the house in accordance with a deed of gift from the widow executed in 1877, which recited the relations which existed between Lehna, the defendant's father and mother and the defendant himself,—how the parents from the time of marriage always resided with Lehna and did him service, while the defendant was to him as an adopted son. The defendant also claimed the land in consequence of this relation.

In all the cases two issues were fixed in the first Court. The first issue succinctly stated was, whether the lands in dispute were covered by the deed of gift?

The second included the question, whether the defendant's relation to the deceased, Lehna, described as that of adopted son, entitled him to the land?

The first Court found that the gift included all the land in dispute and it dismissed the plaintiffs' claim. The plaintiffs appealed with reference to this decision. The appeals had only reference to the gift, whether it included the property in dispute. On this question, the Divisional Judge arrived at a different conclusion from the Munsif, finding that the deed of gift did not include these disputed lands, the house being omitted by an oversight, and the lands, because they were at the time under water. The Divisional Judge did not deal with the question raised by the second issue nor is it raised in the appeal and application to this Court. This matter was permitted to be raised orally in Court by the learned Judge before whom the cases came in chambers.

After hearing the parties, we think that the Divisional Judge rightly held that the deed of gift does not include the lands in dispute. It defined precisely the lands conveyed by reference to the numbers of the fields in the revenue papers, and it gave along with those fields all village rights and rights in common land. We are of opinion that this did not in the circumstances include the house in the village, nor did it include the land which has reappeared from the river. It is not contended on either side that the land now sued for is an accretion to the land existing at the time the deed was executed, and there is nothing to show that according to the law of alluvion prevailing, alluvion land accretes to the adjoining land. The usual course on the large rivers of the Punjab, whose action is very extensive, is that the land which emerges returns to its former owners. In this case there is no doubt as to the former owner, as the numbers are given. We think no inquiry on this point necessary, as the principle above indicated appears to be accepted by both parties. The third ground of appeal was withdrawn in argument.

We think, however, that the appeal must be remanded under Section 536 of the Civil Procedure Code for a decision on the matter of the second issue as we think it should have been stated. We are of opinion that properly the question to be

inquired into was whether, according to the custom of the parties, a childless proprietor may appoint a resident son-in-law to succeed him, and whether the defendant's father was so appointed and treated by the deceased, Lehna, so that the defendant has a right to the succession. It will be seen on reference to many of the reported cases dealing with the institution of *khanadamad* that it is not unusual for the widow to succeed to her husband to all appearance, and for the *khanadamad* not to assert his rights until her decease, or until she divest herself by a deed of gift, as was done in the present instance. The near relations would appear to have acquiesced in the gift as a matter of course, although it comprised 85 kanals of land, while the property now in dispute is only 26 kanals, and their conduct in disputing the present cases is somewhat extraordinary. The lower Court will make due inquiry with regard to the matters specified in the above issues and return findings thereon in the course of three months. The revision case with regard to the house will form the subject of a separate order.

The *Riwaj-i-am* (if any), the *Wajib-ul-arz* and any other authorities on custom should be consulted and returned with the record.

31st May 1892.

BENTON, J.—The return to the remand order of the 1st December 1891 is entirely in the defendant's favour. It goes to show that according to the custom of the tribe a *khanadamad* may be appointed to succeed to the estate of a sonless proprietor, and that the defendant's father was so appointed. This was established by the evidence of witnesses on both sides. We have no doubt that this finding as to custom and as to the defendant's position is correct, as it goes to explain how the defendant was permitted to take anything under the widow's gift.

The defendant has been recorded for a full third share of the property held jointly by the deceased, Lehna, and the plaintiffs, and the effect of the Divisional Judge's decree is to deprive him of 26 kanals 9 marlas of this land which is situated under the high bank of the river and is subject to river action. Lehna's share was a third share and the defendant is entitled to the whole of it by right of inheritance according to the above finding.

He is also entitled to it on other grounds. His title to a full third share was admitted by the plaintiffs in their plaint in the

suit for 4 kanals in which they did not appeal against the first Court's decree dismissing their claim.

Also, from the further information supplied by the first Court showing that the low land was held as shamilat of the parties, which was not before the Court when the order of remand was passed, it seems probable that the deed of gift should be construed as covering the land in dispute, as it specifies certain fields by their numbers and conveys along with them the *hukuk shamilat wa dihati*. These words are quite sufficient to cover not only land recorded as shamilat but also the houses in the village homestead. We need, however, lay no stress on this ground or investigate it further as the defendant's title is otherwise fully established.

We therefore accept the defendant's appeal and dismiss the plaintiffs' suit for 26 kanals 9 marlas with costs in all the Courts.

Appeal allowed.

No. 108.

SANTA SINGH,—PLAINTIFF.

Versus

MUSSAMMAT BUDHWANTI,—DEFENDANT.

REFERENCE SIDE.

Case No. 9 of 1892.

(FRIZELLE & BENTON, JJ.)

Death of muafidar—Resumption of muafi—Settlement made with heir of muafidar—Right of heir to retain possession against the owners.

In a reference under Section 617, Civil Procedure Code, the Divisional Judge stated the point referred (with a full explanation) as follows :—

"When a *muafidar*, not being an owner of land, has during the continuance of his *muafi* grant a right (otherwise than as tenant) to retain possession of the *muafi* land against the owners and such *muafidar* has died and the *muafi* has been resumed, but the settlement has been made with an heir of the *muafidar*, has such heir the right (otherwise than as tenant) to retain possession against the owners?"

Held, that the answer to the question, whether the heir is entitled to retain possession against the (original) owners after he has been settled with depends entirely on the terms of the original grant to him by the owners and is unaffected by settlement operations.

*Reference to the Chief Court by F. C. Channing Esquire,
Divisional Judge, Amritsar, dated 29th April 1892.*

The statement of the facts and the point on which doubt was entertained appear from the following order of the Divisional Judge :—

29th April 1892.

The facts in this case are fairly simple. Megh Singh, the father of plaintiff, who was a carpenter, was granted by the village owners in Sikh times a *muafi* of the land in dispute. At the settlement of 1852 the *muafi* was recognized by the Government and sanctioned for life. The *muafidar* during his life held possession of the land on the usual *muafidar's* title, which is not that of a tenant, as I understand it, but an anomalous right overriding the owner's rights during the continuance of the *muafi*. Probably, during the Sikh rule, if the *muafidar* had quarrelled with the owners, they would have at once resumed his *muafi* and ejected him, but when once the *muafi* had been sanctioned by Government they could not have resumed the *muafi* at pleasure, and I find that the *muafidar* during his lifetime had a right to hold the land even against the will of the owners, but that he was not owner and he was not tenant. On 7th September 1878, the *muafidar* died and the *muafi* was resumed on the 12th October 1878: the Deputy Commissioner ordered that it should be assessed at Rs. 2, and the Tahsildar was ordered to send in the application of the person entitled. The present plaintiff, appellant, sent in an application as heir; the Tahsildar forwarded it to the Deputy Commissioner. No formal order was passed on that, but the application was acted on, and I find that the settlement was made with plaintiff-appellant, as heir of the deceased *muafidar*.

I also find that before twelve years had passed from the date of the *muafidar's* death, the defendant, owner of the land, ejected plaintiff. I find that plaintiff did not abandon the land, and further that as twelve years had not elapsed since the commencement of plaintiff's possession on his title as the heir to a lapsed *muafi* with whom a settlement had been made, he had not acquired by limitation a title which, if invalid originally, could not any longer be disputed.

The question of law then arises: when a *muafidar* not being an owner of the land has during the continuance of his *muafi* grant a right (otherwise than as tenant) to retain possession of the *muafi* land against the owners, and such *muafidar* has died and the *muafi* has been resumed, but the settlement has been made with an heir of the *muafidar*, has such heir the right (otherwise than as tenant) to retain possession against the owners?

This is a question, the answer to which seems to me very doubtful, and for this reason I refer it to the Chief Court under Section 617, Civil Procedure Code, and Section 44 of the Punjab Courts' Act.

At the time this settlement was made with the heir of the deceased *muafidar*, the law in force was Act XXXIII of 1871, and the rules under Section 41 of the Act, D 1, 2, 3. The law now is different—see Financial Commissioner's Circular Memo. 52 of 1888. Under Section 30 of that Act, when a settlement was to be made, if the land was owned by one person the settlement was to be offered to that person: if there were two classes of owners, superior and inferior, the Financial Commissioner could direct to which class the settlement was to be first offered. Under Rule D 1, 2, the Deputy Commissioner was to determine in the case of resumed *muafi* plots, whether the settlement was to be made with the headmen of the village or patti, or, in subordination to the settlement of the whole estate, with the late assignee or his heirs. Rule 3 states the cases in which it shall be in the first instance offered to the assignee or his heirs as an intermediate tenure; these cases include "any case of peculiar hardship." There is no definite statement of between what tenures this tenure is to be intermediate. The settlement is to be made with the heirs of the *muafidar* even though they do not own the land, and it is especially noted in Rule 3 IX that the settlement may, in certain cases, be made with the heir of the late assignee at half-rates of assessment, proprietary or occupancy rights remaining undisturbed. The fact that the law allows a settlement only to be made with owners, either superior or inferior, and that yet the heir of the lapsed *muafidar* is to be settled with, seems to point to the heir being considered an inferior owner, and this view receives some support from para. 135 of Mr. Barkley's Edition of the Directions to Settlement Officers and the note thereto. But there are difficulties in accepting this view; a *muafidar* cannot ordinarily alienate his *muafi* and his grant may be held subject to conditions of service. I have never known a sub-proprietary tenure non-alienable or held on conditions, and yet it is hardly conceivable that the lapse of the *muafi* should increase the rights of the holder of the plot. Again, the settlement may be made with the heir, merely because of circumstances of hardship, and yet I cannot understand how, if the *muafidar* was not a proprietor of either class, superior or inferior, the Revenue Officer's recognition of the heir's claim to be settled with on account of circumstances of hardship can make the heir a proprietor of either class, and yet if he is not an owner, whence is the legal power to settle with him derived. Under the present law, as I understand it, if the *muafidar's* heir can show that he is an inferior proprietor he can claim to be settled with (Rule 67 of Rules under the Land

Revenue Act, 1887), otherwise his right can only be that of an occupancy tenant under Section 5 (a) of the Tenancy Act, 1887. I should be much inclined to take the views mentioned on page 565 of *Punjab Record*, No. 184 of 1883, that the settlement with the heirs of the *muafidar* operated so long as it was continued as a prolongation of the rights of the *muafidar*, as such, just as if the Government, instead of resuming the *muafi*, had sanctioned its continuance on payment of a certain annual sum to Government. This view would make the law intelligible and explain the Settlement Officer's discretion, and it could not, I think, be contended that if the Government instead of resuming a *muafi* originally sanctioned for life continued it to the heirs, these would not have the same rights over the land as the deceased *muafidar*.

On the other hand, I find in *Punjab Record*, Revenue Judgment, No. 10 of 1886, these settlements treated nearly as an acknowledgment of an already existing sub-proprietary tenure, and in that case no doubt the heir's right as sub-proprietor could neither be created nor destroyed though it might be recognized and acknowledged by the assessing Revenue Officer. But I have never regarded an ordinary *muafidar* as a sub-proprietor. A sub-proprietary right would of course be quite separate from the mere right to the enjoyment of the revenue and would apparently be capable of alienation, so that although the *muafi* right proper might be inalienable, the sub-proprietary right could be alienated to a third person, and I am not prepared in this case to find that Megh Singh was an owner of the land, whether superior or inferior. If the settlement had not been made with plaintiff, I do not think that the heir could have claimed to hold the land unless as tenant with rights of occupancy.

I find it very difficult to form an opinion on the question I have referred, but as I am bound to express an opinion I do so in favour of the view, that a settlement with the heir of a *muafidar* acts as a prolongation of the *muafi* grant on new terms, and the heir so settled with has the same right to the possession of the land as that enjoyed by the deceased *muafidar*.

I submit the record to the Chief Court under Section 617, Civil Procedure Code.

The judgment of the Chief Court was delivered by

9th July 1892.

BARRON, J.—This is a reference by the Divisional Judge of Amritsar under Section 617 of the Civil Procedure Code.

The question put to us, with full explanation, is as follows—

“When a *muafidar*, not being an owner of the land, has “during the continuance of his *muafi* grant a right (otherwise “than as tenant) to retain possession of the *muafi* land against “the owners, and such *muafidar* has died and the *muafi* has “been resumed but the settlement has been made with an heir “of the *muafidar*, has such heir the right (otherwise than as “tenant) to retain possession against the owners”?

In dealing with this reference we desire to guard ourselves against being held responsible for any of the opinions or assumptions contained in the question. We regard a *muafidar* simply as the assignee of the Government right to revenue for particular land. He has not, necessarily, any right of ownership or occupation of the land, but he may possess such rights. The right of ownership of the land and the right to receive the revenue, are things quite distinct. A settlement of the revenue payable for a period, or a remission of the revenue for a period, consequently should not affect the right to own or possess. Neither when the *muafi* is confiscated by Government and a settlement is made after the *muafidar's* death with his heir should this affect the proprietary right or the right to occupy. If the heir has no title to own or occupy, this settlement with him, so far as we can see, may only impose a burden on him for nothing. We should say, therefore, that the answer to the question, whether the heir is entitled to retain possession against the (original) owners after he has been settled with, depends entirely on the terms of the original grant to him by the owners and is unaffected by settlement operations.

Reference returned.

No. 109.

ILAHÍ BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

SHAMS-UD-DIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 382 of 1891.

(STODDON & BELLOCK, JJ.)

Limitation Act, 1877, Schedule II, Article 142—Suit for possession of land—Previous dispossession—Abandonment.

The plaintiff sued on 6th November 1890, for possession of certain land in Palwal in the Gurgaon District, alleging it to be the ancestral

property of his father, who had left Palwal some time before the year 1854, and died in 1880, in a village in the Ilaka of Jhansi, without having returned to Palwal.

Held, that the suit was barred by limitation. The Article of the Limitation Act, 1877, applicable was Article 142 under which the deceased owner, or any one claiming under him, had twelve years within which to sue for possession, to be reckoned from the date upon which the said owner discontinued possession. He had discontinued possession in 1844 and left Palwal for good.

The Privy Council's decision reported as I. L. R., 17 Calc., 137 [s. c. *Punjab Record*, No. 23 of 1890] referred to and followed.

First appeal from the decree of Pandit Chandar Bal, Subordinate Judge, Gurgaon, dated 22nd December 1890.

J. C. Basu, for appellant.

K. P. Roy, for respondents.

This was a suit to recover possession of 841 bighas 10 biswas 15 biswansis of land situate in the Khail Patti of the town of Palwal in the Gurgaon District. The suit was filed on the 6th November 1890, and the plaintiff alleged that the land was the ancestral property of his father, Imam Bakhsh, who left Palwal some time before the year 1854, and died in 1880, in a village in the Ilaka of Jhansi, without having returned to Palwal.

The defendants pleaded that Imam Bakhsh was never in possession of the land; that the plaintiff was not Imam Bakhsh's son; and that the suit was long barred by limitation.

The first Court found all these points against the plaintiff, and also that, in any case, Imam Bakhsh had abandoned the land.

The plaintiff appealed to the Chief Court on various grounds.

The judgment of the Court was delivered by

16th June 1892. STODDON, J.—This was a suit for possession of 841 bighas 10 biswas 15 biswansis of land in the Khail Patti of the town of Palwal in the Gurgaon District, which plaintiff alleged was the ancestral property of his father Imam Bakhsh, who left Palwal some time before the year 1854, and died in 1880, in the village of Parichha, in the Ilaka of Jhansi, without having returned to Palwal.

The Subordinate Judge dismissed the suit on the ground that plaintiff had failed to prove that he was the son of Imam Bakhsh, or that the land in suit ever belonged to Imam Bakhsh.

He also found that Imam Bakhsh had, in any case, abandoned his land. Plaintiff has appealed to this Court, and we have heard counsel on his behalf, but we think that the claim on the face of it is barred by limitation, and that there cannot be any doubt that Imam Bakhsh abandoned his land, if he ever had any.

Conceding for the sake of argument that plaintiff is Imam Bakhsh's son, and that the land in dispute belonged to Imam Bakhsh, it is clear from the plaint that Imam Bakhsh discontinued possession of it in the year 1252 Fasli, corresponding with A. D. 1844, when a lease of the whole of Patti Khail was given by Government to Amir Ali and Prem Raj for a term of fifteen years. It expired in 1859, and a fresh lease was then given to Ilahi Bakhsh and Sahib Ram for the remaining period of the settlement, which nominally terminated in 1872, but actually terminated at the end of the spring harvest of 1878, when the new settlement came into force.

In 1859 Imam Bakhsh made no attempt to recover his land, nor did he present himself during the settlement operations which began in 1872, and lasted for many years. Plaintiff states that he himself presented a petition in 1879 to the Settlement Superintendent, praying that his name might be entered in the Settlement papers, but even if his statement is true, his prayer was disregarded, and his proprietary right does not appear to have ever been recognized or acknowledged. The only recognition of Imam Bakhsh's rights which can be shown is, that his name occurs in a list of absconders attached to paragraph 8 of the *Wajib-ul-arz* of 1854. Great stress has been laid on this paragraph, as showing that defendants held the land in trust for Imam Bakhsh. It appears to have been made at a time when farmers, other than defendants, were in possession of the land, but, apart from this fact, it does not evidence a trust, either express or implied, and indeed contemplates the possibility of the occupant of land declining to give it up to the absconder on his return; and the remark recorded with reference to Imam Bakhsh and other absentee co-sharers of the Khail Patti is, not that they shall receive back their land, but that they shall receive as much land as they shall be able to manage. Paragraph 11 of the *Wajib-ul-arz* has no applicability at all. It mentions several absentee co-sharers by name, and states that the khewat contains a note to the effect that they will get back their land on return to the village.

Imam Bakhsh is not one of the men so mentioned. It further provides for the case of future absentees.

The case is very similar to one recently decided by their Lordships of the Privy Council, and reported as I. L. R., 17 Calc., 137, [s. c., *Punjab Record*, No. 23 of 1890.]. The Article of the Limitation Act applicable to the present case is Article 142, under which Imam Bakhsh, or any one claiming under him, had twelve years within which to sue for possession, to be reckoned from the date upon which Imam Bakhsh discontinued possession of the land. He discontinued possession in 1844 and left Palwal for good. His proprietary right was not recognized by any grant of malikana, and he ceased to have any relation with the land, which he undoubtedly abandoned.

Under such circumstances, his suit was rightly dismissed as time barred, and we dismiss this appeal with costs.

Appeal dismissed.

No. 110.

APPELLATE SIDE. {

HAR KISHEN DAS,—(PLAINTIFF),—APPELLANT,

Versus

ALLAH BAKHSH,—(DEFENDANT),—RESPONDENT.

Case No. 446 of 1891.

(STOGDON & BULLOCK, JJ.)

Indian Limitation Act, 1877, Articles 141 and 144—Suit by reversioner to contest alienation by Hindu widow, made when in possession of her deceased husband's property.

When a Hindu widow has been in possession of her deceased husband's immoveable property on the usual widow's estate, the Article governing a suit by a reversioner suing after the widow's death to contest an alienation made by her as being without necessity is Article 141 and not Article 144, Schedule II, Limitation Act, 1877.

*Further appeal from the decree of Colonel O. H. T. Marshall,
Divisional Judge, Lahore, dated 16th February 1891.*

Grey, for appellant.

Ishwar Das, for respondent.

The plaintiff sued to recover possession of a shop, situate in the city of Lahore, under the following circumstances. The property belonged to one Lal Misar, who died about 1852, leaving a widow and a son; and the son died, leaving a widow, about two years after his father.

On the 16th February 1876, Lal Misar's widow sold the shop in suit to one Fattah Chand by a registered conveyance. One Allah Bakhsh became proprietor by obtaining a decree against Fattah Chand in a suit for pre-emption.

Lal Misar's widow died about March 1888, and two years after her death, *viz.*, on 10th March 1890, Har Kishen Das, the nearest collateral of Lal Misar, instituted the present suit, alleging that Lal Misar's widow had no authority to sell the shop and that the sale was without necessity.

The Court of first instance framed eleven issues with reference to pleas of custom among Lahore Brahmins; the shop not being ancestral property; and that the plaintiff was not the reversionary heir; raised by the defendant, and after recording evidence dismissed the plaintiff's suit with costs.

The Divisional Judge held the plaintiff's suit to be barred by limitation (without specifying under what Article of the Limitation Act) on the ground "that defendant's possession has been adverse against all comers for sixteen years."

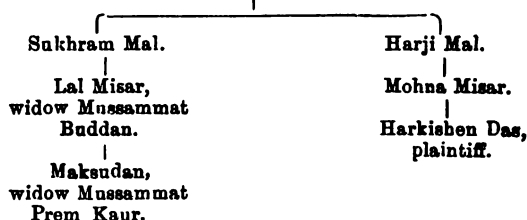
The plaintiff preferred a further appeal to the Chief Court. The Chief Court reversed the Divisional Judge's judgment, holding the suit to be within limitation being governed by Article 141, Schedule II, Limitation Act.

The judgment of the Court was delivered by

STODDON, J.—

15th June 1892.

ABINASHI MISAR.



This is a suit for possession of a shop in the Lohari Mandi in Lahore. It belonged to Lal Misar, who died about 1852, leaving a widow Mussammat Buddan, and a son Maksudan, who died two years after his father, leaving a widow, Mussammat Prem Kaur. On the 16th February 1876, Mussammat Buddan sold the shop to one Fattah Chand by registered sale deed. Allah Bakhsh obtained it from him by a suit for pre-emption. Subsequently, Allah Bakhsh sold half of it to Khuda Bakhsh, but he repurchased it from him and is now in the position of vendee from Mussammat Buddan. She died about March 1888. Two years after her death, Har Kishen

Das, the nearest collateral of Lal Misar, sued Allah Bakhsh for possession of the shop, on the ground that the alienation by Mussammat Buddan was without necessity. Defendant raised many pleas, the majority of which were decided in his favour by the first Court, which dismissed the suit. On appeal, the Divisional Judge held that defendant's possession had been adverse against all comers for sixteen years and confirmed the decree of the first Court. Plaintiff has now appealed to this Court.

The Divisional Judge has apparently applied Article 144 of the Limitation Act to the suit. It is admitted by respondent's pleader that if Mussammat Buddan was rightfully in possession of the shop on the usual widow's estate the Article applicable is Article 141, according to which plaintiff had twelve years from Mussammat Buddan's death within which to sue for possession of it; but it is contended that Mussammat Buddan was a trespasser without any title to the shop, and that the rightful owner at the time of the sale was Mussammat Prem Kaur, the widow of Maksudan, the last male proprietor, and it is urged that the possession of the purchaser had become adverse to her at the time of the institution of the suit and consequently to her reversioners also. The weight of authority is against this contention, but we are not prepared to hold that Mussammat Buddan had no title to the shop. In cases in which the death of a father has been followed at a short interval by the death of his only son, it is not unusual for the father's widow to take the property in preference to the widow of the son, or at all events for the two widows to share it together. In the present case, Mussammat Buddan was undoubtedly looked on as proprietor of the property left by her husband Lal Misar, notwithstanding the fact that it devolved upon their son Maksudan for a short period and that he left a widow. She dealt with it as her own property, and in the litigation in 1862 and again in 1869, she appears to have been treated as the owner of the widow's estate, and it does not appear to have occurred to any one that Mussammat Prem Kaur had a superior right. Under such circumstances, the limitation must be governed by Article 141 of the Limitation Act and the suit is within time.

We accept the appeal and remand the case to the lower Appellate Court for decision on the merits. Certificate of refund of stamp to be given; other costs to be costs in the case.

Appeal allowed.

No. 111.

ABDUL WAHAB,—(DECREE-HOLDER),—APPELLANT,	}	APPELLATE SIDE.
<i>Versus</i>		
GHULAM RASUL SHAH,—(JUDGMENT-DEBTOR),—RESPONDENT.		

Case No. 451 of 1891.

(STODDON & BULLOCK, JJ.)

Punjab Laws Act, 1872—Pre-emption—Money paid into Court by successful pre-emptor and withdrawn by original purchaser—Reduction of price by Appellate Court—Interest on excess in hands of original purchaser.

A pre-emptor paid into Court a sum of money in satisfaction of the decree passed in his favour, which sum was withdrawn by the original purchaser.

On appeal, the pre-emptor obtained a reduction of the price to be paid for the land. The original purchaser withdrew from Court the money allowed, knowing that the pre-emptor asserted that it was not due and that he had appealed, the original purchaser thus enjoying the use of the money for a long period.

Held, that under such circumstances there was no reason why the defendant (the original purchaser) should not be compelled to pay interest on the excess sum which he had enjoyed, which the Court allowed at 6 per cent. per annum.

L. R., 3 P. C., 465 and I. L. R. 7, All., 432, referred to.

Further appeal from the decree of Khan Muhammad Hayat Khan, C. S. I., Divisional Judge, Mooltan, dated 19th January 1891.

Lal Chand, for appellant.

K. P. Roy, for respondent.

This was an appeal under the provisions of Section 244, Civil Procedure Code.

The plaintiff obtained a decree for pre-emption in the Court of first instance, the purchase-money being fixed at Rs. 1,664-15-0. The money was paid into Court in October 1887.

The Divisional Judge enhanced the purchase-money by Rs. 835-1-0, making it Rs. 2,500 in all.

The Chief Court on further appeal fixed the purchase-money at Rs. 1,250.

The result was that the defendant enjoyed the use of Rs. 304 for 28 months and Rs. 835-0-0 for 24 months.

The plaintiff claimed interest on the excess purchase-money in the defendant's hands which the Court of first instance allowed at 12 per cent. per annum.

The Divisional Judge on appeal disallowed the claim to interest. The plaintiff then preferred a further appeal to the Chief Court.

The judgment of the Court was delivered by

29th June 1892.

STODOL, J.—Abdul Wahab obtained a decree against Ghulam Rasul Shah, vendee, for pre-emption of certain land on payment of a sum of Rs. 1,664-15-0, minus costs. On the 7th October 1887, he paid into Court a sum of Rs. 1,553-15-6, which was taken out by Ghulam Rasul Shah. Both parties were dissatisfied with the decree and appealed to the Divisional Judge, who enhanced the amount to be paid to Rs. 2,500. Thereupon, Abdul Wahab, on the 3rd April 1888, paid a further sum of money into Court, which was also taken out by Ghulam Rasul Shah. Abdul Wahab appealed to the Chief Court, which on the 8th June 1889 reduced the amount to be paid by him to Rs. 1,250.

Ghulam Rasul Shah refunded on the 15th February 1890 the amounts received by him in excess of this sum, and on the 24th July 1890 the Subordinate Judge directed him to pay to Abdul Wahab a sum of Rs. 316 on account of interest thereon. He appealed to the Divisional Judge, who set aside the order and Abdul Wahab has now appealed to this Court.

The judgment of the first Court is based on a judgment of their Lordships of the Privy Council in the case of *Rodger v. the Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465, and on various judgments of the High Courts of this country based upon it, and among which a judgment published as I. L. R., 7 All., 432, may be specified as having been delivered in a case somewhat similar to the present one.

The learned pleader for respondent has endeavoured to draw a distinction between the case decided by the Privy Council and the present case. He points out that in the former case the respondents before the Privy Council had compelled the petitioners to pay them money in execution of decree, which money they had subsequently to refund, while in the present case the pre-emptor put his own decree in motion and paid money into Court in order to keep it alive. It may be conceded that there is a considerable difference between the facts of the two cases, but they appear to be both governed by the same principle. If Ghulam Rasul Shah had not taken the money out of Court the pre-emptor would have had no claim against him for interest, but he took the money, knowing that the pre-emptor asserted

that it was not due and that he had appealed to the Divisional Judge and wrongfully enjoyed the use of it for a long period. Under such circumstances, there is no reason why he should not be compelled to pay interest upon it,—I. L. R., 7 All., 432, is a very similar case to the present one. We are not prepared to allow a higher rate of interest than Rs. 6 p. c. p. a., the rate usually allowed on decrees. The calculation of the first Court is not correct. Ghulam Rasul Shah enjoyed Rs. 304 and not Rs. 414 for twenty-eight months and Rs. 835 for twenty-four months. We allow a round sum of Rs. 150 with costs throughout.

Appeal allowed.

No. 112.

HIRA, representative of NANAK, deceased,—(DEFENDANT),—
APPELLANT,

Versus

BHANDARI,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 483 of 1891.

(STODDON AND BULLOCK, JJ).

Indian Contract Act, 1872—Marriage brokerage contract—Void agreement—Guarantee.

S. betrothed his minor daughter to the plaintiff's son, who was also a minor, and N. the brother-in-law of S. entered into an agreement with the plaintiff's father by which he guaranteed that S. should celebrate a marriage between the boy and girl after the expiration of five and before the expiration of eight years. S. married his daughter elsewhere and the plaintiff sued N. for damages.

The plaintiff's father D. betrothed his marriageable daughter to N. receiving Rs. 1,200 from him: the marriage took place shortly after the betrothal. S. agreed to give his infant daughter to the plaintiff's son, and N. guaranteed the performance of S's undertaking.

The Divisional Judge held the agreement to be a contract of guarantee.

Held, that there was no enforceable agreement of guarantee: the agreement was entirely for the benefit and satisfaction of N. himself and his promise was *nudum pactum*. He could in fact do nothing more than endeavour to induce S. to marry his daughter to the plaintiff's son and if the parties contemplated that he should purchase S's consent, such an undertaking on his part would be void according to the view expressed in the Full Bench decision reported as *Punjab Record* No. 128 of 1889.

Further appeal from the decree of G. W. Rivas Esquire, Additional Divisional Judge, Hoshiarpore, dated 9th February 1891.

P. C. Chatterjee, for appellant.

The parties to the suit were Suds of the Dera tahsil of the Kangra District.

The plaintiff alleged that on the 18th November 1882, he was betrothed to a girl called Chirie, the daughter of the defendant Saudagar, and that the other defendant Nanak was a party to the contract: that in exchange for the betrothal the plaintiff promised his sister to the defendant Nanak and duly married her to him, but that on the 14th Sawan, Sambat 1946, the defendant disposed of the girl elsewhere for Rs. 2,200.

The District Judge, Kangra, found that the plaintiff had made out his case and gave him a decree for Rs. 1,000, with costs in proportion.

The Divisional Judge on appeal was of opinion "that "there was no legal bar to plaintiff recovering damages from "Nanak on account of the breach of the betrothal contract "which he guaranteed. As to the amount that should be "allowed, I think that the sum awarded by the District Judge "is excessive. I think that having regard to the position of "the parties, and the failure on the part of the plaintiff to "prove that he had incurred actual substantial expenses, no "more than Rs. 500 should be allowed." The Divisional Judge decreed accordingly.

A further appeal was presented by the representative of Nanak (who had died meanwhile) to the Chief Court and the appellants contention is shown in the judgment of the Court, which was delivered by

1st July 1892.

BULLOCK J.—The questions for decision lie within a very small compass. The facts are that Saudagar betrothed his minor daughter to the plaintiff's son, who was also a minor, and Nanak the brother-in-law of Saudagar entered into an agreement with the plaintiff's father by which he guaranteed that Saudagar should celebrate a marriage between the boy and girl after the expiration of five years and before the expiration of eight. Saudagar has married his daughter to

some one else, and the plaintiff through his father sues Nanak for damages.

The plaintiff's father, Dhomali, betrothed his marriageable daughter to Nanak, and received Rs. 1,200 from him : the marriage took place shortly after the betrothal. Saudagar agreed to give his infant daughter to the plaintiff's son, and Nanak guaranteed the performance of Saudagar's undertaking. It is contended by the learned pleader for the appellant that the contract of guarantee was apparent only, and that Nanak really undertook to find a wife for the plaintiff's son in consideration of the plaintiff's daughter having been given to him ; and he urges that such a consideration was opposed to public policy, and void upon the authority of the Full Bench ruling in *Punjab Record* No. 128 of 1889.

The agreement is between the plaintiff and Nanak : Saudagar is no party to it, and by its terms Nanak undertakes that Saudagar shall marry his daughter to the plaintiff's son. The Divisional Judge holds the agreement to be a contract of guarantee ; but it is clear that no promise was made for the benefit of Saudagar, who must be considered as holding the position of the principal debtor, and there was therefore no sufficient consideration to the surety for giving the guarantee. In our opinion, there was no enforceable contract of guarantee : the contract was entirely for the benefit and satisfaction of Nanak himself and his promise was *nudum pactum* : he could in fact do nothing more than endeavour to induce Saudagar to marry his daughter to the plaintiff's son, and if the parties contemplated that he should purchase Saudagar's consent, such an undertaking on his part would be void according to the view expressed in the Full Bench decision, which has been quoted in an earlier part of this judgment. We are therefore of opinion that the plaintiff's suit against Nanak was not maintainable, and the appeal must be allowed. The orders of the lower Courts are reversed and the plaintiff's suit is dismissed. Under the circumstances of the case, there will be no order for costs in any of the Courts.

Appeal allowed.

No. 113.

SOHNA SINGH & MUSSAMMAT KISHNO,—(DEFEND-
ANTS),—APPELLANTS,

APPELLATE SIDE. }

Versus

KAHAN SINGH & OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Case No. 493 of 1891.

(STOGDON AND BULLOCK, JJ.)

Custom—Inheritance—Right of sister and sister's son—Dhariwal Jats, Fazilka tahsil, Ferozepore District.

Found in a suit the parties to which were Dhariwal Jats of the Fazilka tahsil of the Ferozepore District that no custom was established by which a sister and her son were entitled to inherit acquired landed property in preference to collaterals descended from the grandfather of the deceased owner.

Further appeal from the decree of Colonel H. J. Lawrence, Divisional Judge, Ferozepore, dated 3rd April 1891.

Gouldsbury, for appellants.

P. C. Chatterjee, for respondents.

The material question for decision in this suit was, whether by custom a sister and her son have a better right than collaterals descended from the grandfather of the last owner to succeed to acquired landed property. The parties were Dhariwal Jats of mauza Dhola in the Fazilka tahsil of the Ferozepore District.

The Additional Divisional Judge (Mr. W. O. Clark) after resettling the issues remanded the appeal before him for a finding on the question of custom, placing the onus on the defendants (the sister and her son). The first Court found that the defendants had not established the custom contended for by them. The Divisional Judge (Colonel H. J. Lawrence) concurred in this view and gave the plaintiffs a decree.

The defendants preferred a further appeal to the Chief Court. The judgment of the Court finding the custom not proved and upholding the decree in favour of the plaintiffs was delivered by

30th June 1892.

STOGDON, J.—Natha Singh left five sons, Nihal Singh, Mughlu Singh, Samand Singh, Panjab Singh and Baghel Singh. Plaintiffs are sons of the first three. Panjab Singh's descendants have not joined in the suit. Baghel Singh left a son named Ram Singh, who died [about 24 or 25 years ago.

On his death mutation with regard to his land was made in favour of his mother Mussammat Saddam and his widow Mussammat Daya Kaur. The latter re-married, and then Mussammat Saddam was recorded as proprietor of the whole estate. Baghel Singh also left a daughter, Mussammat Kishno, who was married to Dhian Singh and had by him a son named Sohna Singh. Mussammat Saddam died on the 19th March 1889. Sohna Singh was found in possession of her estate so mutation was made in his favour, whereupon plaintiffs brought the present suit for possession of the land. In their plaint, plaintiffs spoke of the land as Baghel Singh's property and did not mention that it had descended to Ram Singh. The Divisional Judge, Colonel Lawrence, appears to have been misled by this, though the facts are clearly stated by the first Court and he treated the case as one of the succession of a daughter and her son, and remanded the case under Section 562 to the first Court, directing it to implead Mussammat Kishno and to decide whether the plaintiffs were entitled to succeed to the property, which he found to have been acquired by Baghel Singh, in the presence of the daughter and her son. He placed the onus on the plaintiffs. The first Court found that they had failed to prove their right and dismissed the suit. Plaintiffs then appealed to the Divisional Judge, Mr. Clark, who remanded the case for inquiry as to whether Ram Singh was possessed of the estate, and, if he was, whether his sister excluded plaintiffs. The return on the first point was in the affirmative and on the second in the negative. Colonel Lawrence before whom it came admitted that he had been mistaken in supposing that the claim had anything to do with Baghel Singh's estate and accepted plaintiffs' appeal.

In appeal to this Court defendants' counsel points out that plaintiffs sued for the estate as that of Baghel Singh and contends that they should not have been allowed to change their case, and to sue for it as Ram Singh's estate, but there is no doubt whatever that Baghel Singh predeceased Ram Singh and plaintiffs' loose and inaccurate statements cannot alter facts. Moreover, it is not alleged in the grounds of appeal that the finding, that the estate descended to Ram Singh, is incorrect. He appears to have died in his youth and as on his death and on the re-marriage of his widow the property reverted to Mussammat Saddam, plaintiffs rather naturally described it as having descended to her from her husband and made no mention of the intermediate stages by which it reached her.

Sohna Singh pleaded that Baghel Singh had acquired the land 35 or 36 years previously and that a daughter's son had a better right than collaterals to acquired property. He further stated that his father had lived with Mussammat Saddam for 24 or 25 years as khanadamad and that he was born in her house and therefore had a superior right. Plaintiffs asserted that the property was ancestral, but the history of the parent village Kingri, and of its offshoot Dhola, in which the land in dispute is situated, tends to show that their contention is incorrect. There is nothing to show that Dhian Singh was a khanadamad of Baghel Singh who had a son and therefore did not require one. Sohnna Singh merely pleaded that he lived with Mussammat Saddam as her khanadamad. On the death of Baghel Singh and Ram Singh, he naturally went and resided with his mother-in-law and cultivated her land, but he did not thereby acquire any rights of inheritance. The sole question in the case is whether a sister and her son have a better right than collaterals to succeed to acquired estate. According to Answer 26 in the *Riwaj-i-am* sisters and their sons are in no case entitled to inherit (*Wilson's Code of Tribal Custom in the Sirsa District*, 132). Answer 16 shows that even a daughter is not allowed to inherit and according to Answer 17 no distinction is made between ancestral and acquired property of the father (126 & 127). According to Answer 15, page 141, ghar jawai or resident son-in-law has no right to inherit. In the present case the presumption is against defendants' right to succeed and they failed to rebut it. We therefore dismiss their appeal with costs.

Appeal dismissed.

No. 114.

MUSSAMMAT LALAIRI AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE. {

Versus

HUSSAIN SHAH,—(DEFENDANT),—RESPONDENT.

Case No. 527 of 1891.

(STOGDON AND BULLOCK, JJ.)

Civil Procedure Code, 1882, Sec. 375—Compromise of suit—Finality of decree—Allegation of fraud by party to compromise.

A decree made in accordance with a lawful agreement or compromise is final under Section 375, Civil Procedure Code.

No appeal lies from such a decree, escape from which on the ground of fraud can only be obtained by a regular suit or upon application for review of judgment.

The lawfulness of an agreement or compromise is distinct from the question of its legal validity, and it is sufficient for the purposes of Section 375 that there has been an agreement the objects of which are not unlawful.

Punjab Record, No. 105 of 1889, and No. 81 of 1890, referred to and followed.

Further appeal from the decree of Khan Muhammad Hayat Khan, C. S. I., Divisional Judge, Mooltan, dated 30th January 1891.

Sham Lal, for appellants.

Oertel, for respondent.

The plaintiffs in this suit sought to recover possession from the defendant, Hussain Shah, of 61 kanals and 3 marlas of shamilat land situate in mauza Karak in the Chiniot tahsil of the Jhang District, and Rs. 96-8-0 on account of value of produce.

The parties compromised the suit before the first Court a formal instrument being executed which, according to the Court's proceedings, was attested before it by all parties. The arrangement come to was that the plaintiffs should obtain a decree for possession of the land and that the claim for value of produce should be dismissed.

The defendant appealed to the Divisional Court asking that the lower Court's decree should be set aside on the ground that he was old and infirm and that he had been induced to enter into the compromise by fraud.

The Divisional Judge, after a remand for inquiry on the ground alleged by the defendant, dismissed the suit as against the defendant, Hussain Shah. He said: "I am of opinion that there is not a shadow of doubt that no right in respect of the land in dispute accrues to the plaintiffs, unless it be redeemed by Hoshnak Rai, the original proprietor, after expiration of the term of mortgage; and that the deed of compromise was obtained from the defendant by the fear of a decree for produce being brought to bear on him, and that the compromise was without consideration."

The plaintiffs appealed to the Chief Court urging that the decree of the first Court was final under Section 375, Civil

Procedure Code, and that the compromise was not void on the ground of fraud.

The judgment of the Chief Court reversing the decree of the Divisional Judge was delivered by

1st July 1892.

BULLOCK, J.—The plaintiffs brought a suit against the defendant to recover possession of land and also a sum of money as the value of its produce, and the suit was brought to an end by a settlement under which the defendant confessed judgment with regard to the claim for the land and the plaintiff gave up his claim to the value of the produce. The defendant after that appealed to the Divisional Judge to set aside the compromise upon the ground that it was fraudulently obtained from him by the plaintiff taking advantage of his mental condition which rendered him incapable of understanding his act and of forming a rational judgment as to its effect upon his interests.

There is abundant authority for holding that a compromise can be set aside on the ground of fraud, only by regular suit or by review, and the point may be shortly decided to this effect.

I. L. R., 5 Calc., 27.
I. L. R., 10 Calc., 612.
Punjab Record, No. 105 of 1889.
Punjab Record, No. 81 of 1890.

No appeal lay to the Divisional Judge on the ground of fraud, and his proceedings were so far without jurisdiction.

But it is argued that there was no agreement or compromise at all owing to the defendant's want of understanding: that therefore there was no lawful agreement or compromise and therefore an appeal lay. In the case last cited it was held that the word "lawful" refers to the legality of the terms or conditions of the compromise, and we agree in that opinion. We are also of opinion that the lawfulness of an agreement is distinct from the question of its legal validity, and it is sufficient for the purposes of the section that there has been an agreement the objects of which are not unlawful: its invalidity must be established by applications to the Court or by suit and not by appeal. We reverse and set aside the order of the Divisional Judge as made without jurisdiction. Appeal allowed with costs.

Appeal allowed.

No. 115.

MUSSAMMAT SHARFAN AND FIROZ,—(DEFENDANTS),—
APPELLANTS,

Versus

KAMMU AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

APPELLATE SIDE.

Case No. 556 of 1891.

(RIVAZ AND BULLOCK, JJ.)

Custom—Inheritance—Right of daughter and daughter's son to exclude nephews—Jhiwars (Awans) of Rawalpindi.

Found in a suit the parties to which were Awans by tribe and Jhiwars (water-carriers) by occupation in the town of Rawalpindi, that no custom was proved entitling a daughter and a daughter's son to exclude a brother and nephews in succession to acquired immoveable property (a water-mill).

Further appeal from the decree of R. W. Trafford Esquire, Divisional Judge, Rawalpindi, dated 1st April 1891.

P. C. Chatterjee, for appellants.

K. P. Roy, for respondents.

The question for determination in this appeal was whether by custom a married daughter and her son succeed to self-acquired immoveable property (a water-mill) in preference to a brother and nephews.

The parties were Awans by tribe and Jhiwars (water-carriers) by occupation and residents of the town of Rawalpindi.

The suit came before the Chief Court on a previous occasion upon appeal from a decree of the Divisional Judge, Rawalpindi (Mr. F. P. Beachcroft), who reversed the decree of the Court of first instance. The Chief Court remanded the suit under Section 562, Civil Procedure Code, upon the following grounds—

“The object of this suit which is brought by the rever-
sionary heirs of one Shadi is to challenge a gift of half a
water-mill by one of Shadi's widows, Mussammat Banno, in
favour of her daughter and grandson.

“The suit has been dismissed by the Divisional Judge
“ (reversing the decree of the first Court) upon the ground
“ that the subject matter of the suit is proved not to have been
“ the property of Shadi, but of Mussammat Banno herself, who
“ obtained it from her own relatives; that it should therefore
“ be considered her *peculium* and as such could be alienated with-
out restriction.

“The question of the correctness of the above finding is
“the only point which has been argued before us by the
“parties’ pleaders, both of whom appeared to acquiesce in
“the view that if we differed from the Divisional Judge’s
“decision on this point, the proper course would be to remand
“the case to the Divisional Judge that he might dispose of the
“other questions raised in the two appeals which were filed
“in his Court.”

After fully considering the arguments and examining the then present record and connected files, the Chief Court (Rivaz and Stogdon, JJ.) found themselves unable to uphold the Divisional Judge’s decree. The appeal was accordingly remanded under Section 562, Civil Procedure Code, with the following directions—

“The plaintiffs have undoubtedly a *locus standi* to contest
“Mussammat Bauno’s alienation, and the other questions
“arising in the case call for decision. In redeciding the appeal
“(either on the present record or after such further inquiry as
“he may deem necessary regarding the rights of a daughter to
“succeed in preference to the male collaterals) the Divisional
“Judge will not fail to notice that our present finding affirms
“that the property in question is not ancestral but the acquired
“property of Shadi. We mention this, as if further inquiry
“into the custom is considered necessary, this fact should be
“prominently brought forward.”

The Divisional Judge, Rawalpindi, upon the appeal again coming before him remanded the case under Section 566, Civil Procedure Code, for an inquiry into the custom.

The opinion of the District Judge (Lala Narain Das) was as follows—

“Both parties have produced evidence. I do not however
“think that on the evidence adduced it can be said that the
“defendants have proved the custom as contended. The de-
“fendants’ witnesses in a general way depose to the existence of
“a custom which allows daughters to succeed in preference to
“male collaterals, and there are no instances quoted in which
“such could be said to have been the case. Some of the wit-
“nesses have tried to illustrate their evidence by instances
“which they said bore on the points, but a closer examination
“of the facts showed that the instances were irrelevant.”

The Divisional Judge (Mr. R. W. Trafford) dismissed the plaintiffs’ appeal. He said: “It seems to me that persons

“so nearly related as nephews succeed in preference to married daughters as a general rule, and that it was for the daughters to prove that an exception existed in the case of self-acquired property which they have failed to do. The materials for forming a judgment either way are very meagre, but I do not think it at all likely that any further remand would throw more light on the case. I find then that married daughters and daughters’ sons do not exclude nephews and dismiss the defendants’ appeal.”

The defendants preferred a further appeal to the Chief Court. The judgment of the Court was delivered by

RIVAZ, J.—The general facts of this case appear from this Court’s order dated 10th March 1890, remanding the case to the Divisional Court for redecision, after disposing of the preliminary question of plaintiffs’ right to sue. *4th July 1892.*

The principal question remaining for decision is as to the right of Shadi’s daughter to succeed to the jhandar in suit in the presence of Shadi’s brother and brothers’ sons. We think that the burden of proof was, at least in the first instance, upon the defendants, the daughter and the daughter’s son, to prove their right to succeed. The nature of the property and the class to which the parties belong, which are facts relied upon as reasons for imposing the onus upon the plaintiffs, must, we consider, rather be urged as matters which go to prove that the defendants have discharged the burden of proving their case, or at least have shifted the onus on to the opposite side.

It was however contended that even if the burden of proof lay upon the defendants, they had succeeded in discharging the same. It was urged that the preponderance of the evidence as to custom was in defendant’s favour; that the property being acquired by Shadi and not being ancestral, and being not agricultural land but a water-mill, was property which custom was likely to recognize as descending to a daughter rather than to collaterals, and stress was also laid upon the fact of the parties being Jhiwars by caste and not agriculturists. The evidence as to custom is so meagre that it is impossible to hold that it proves any custom in favour of the daughter’s succession. So that after making every allowance for the other points urged on defendants’ behalf, we find it impossible to affirm that they have succeeded in shifting back the onus of proof on to the plaintiffs.

It was next urged that no custom being established, the Muhammadan law must be applied. The reply to this argument is, that the parties are undoubtedly governed by custom and not by Muhammadan law, that the customary rule is the only matter in issue, and that the rule of law is wholly irrelevant to the case (*vide* the remarks at pages 24, 25 of the report of Civil Judgment No. 4, *Punjab Record*, 1891).

The only 'other point is as to the plaintiffs' right to a decree for immediate possession. The defendants having no rights, and Mussammat Banno, the surviving widow of Shadi, having relinquished her rights of possession in plaintiffs' favour (*vide* her statement in the present case), we are of opinion that no good grounds exist for refusing immediate possession to the plaintiffs.

For the above reasons the appeal is dismissed with costs.

Appeal dismissed.

No. 116.

**KHANAN AND OTHERS.—(DEFENDANTS),—
APPELLANTS,**

Versus

**MUSSAMMAT JATTI AND OTHERS.—(PLAINTIFFS),—
RESPONDENTS.**

Case No 634 of 1891.

(RIVAZ AND BULLOCK, JJ.)

Custom—Inheritance—Kalru Jats, Mooltan District—Exclusion of nephews by daughters of deceased.

Found in a suit the parties to which were Kalru Jats (Muhammdas) of tahsil and District Mooltan, that no uniform custom was established by which daughters were excluded by brothers' sons from taking the share of their father's estate falling to them under Muhammadan law. Punjab Record, No. 12 of 1889, referred to and followed.

Further appeal from the decree of Khan Muhammad Hayat Khan, C. S. I., Divisional Judge, Mooltan, dated 19th March 1891.

Madan Gopal, for appellants.

Lal Chand, for respondents.

The question for decision in this appeal was whether by the custom of the Kalru Jats of Mooltan, daughters are excluded by near agnates.

The plaintiffs were the three daughters of Kadir Bakhsh, whose widow, Mussammat Khairan, died shortly before suit. The defendants were the sons of the brothers of Kadir Bakhsh.

The plaintiffs claimed two-thirds of their father's property in accordance with Muhammadan law. The defendants pleaded, that by custom they excluded the plaintiffs and took the whole of the deceased's property.

The District Judge of Mooltan was of opinion "that 'there is no positive custom among the Kalrns of Mooltan requiring the exclusion of daughters by brothers' sons and other collaterals, and that therefore the rule of decision must be the Muhammadan law according to which the plaintiffs are entitled to two-thirds of the property of their father.'" The District Judge decreed accordingly.

The defendants appealed to the Divisional Judge, who in dismissing their appeal recorded the following remarks: "It 'appears from all the instances quoted that in most cases daughters have excluded collaterals, and in some cases nephews, from inheriting the property of the deceased. In some instances daughters have received shares of the estate, while in others daughters have been excluded by nephews and brothers.

"Having regard to the several instances, I am of opinion that no custom has been proved among the Kalru tribe of Mooltan by which it can be held that daughters are excluded from inheritance. Unfortunately the complicated disputes in respect to the custom of the Punjab arose owing to the selfishness of the heads of the tribes, and this has given rise to and increased disputes among the people of the country and brought them to ruin.

"According to the attestation in the *Wajib-ul-arz* made at the time of the settlement, the will of male members who wished to establish a custom in the tribe for their own selfish motives was declared to be a custom. No woman was a party in getting the custom recorded. I am of opinion that it is opposed to general equity to consider any party who took no part in getting the custom recorded, as bound by the custom, simply on the basis of the entry in the papers."

The defendants preferred a further appeal to the Chief Court, the judgment of which was delivered by

RIVAZ, J.—This case is a sequel to Civil Judgment No. 12, 2nd July 1892. *Punjab Record* of 1889, the parties being the same in both cases.

The daughters of Kadir Bakhsh, deceased, a Kalru Jat of the Mooltan tahsil, are now suing to recover two-thirds of their father's property from the defendants, who are the deceased's brothers' sons. The plaintiffs rely upon Muhammadan law, alleging that there is no uniform custom regulating the rights of succession of daughters in the presence of nephews. The defendants retort that the parties are governed by custom and not by Muhammadan law, and that under the custom nephews are entitled to succeed to the absolute exclusion of daughters.

The concurrent finding of both Courts is to the effect that no uniform and invariable custom has been shown to obtain in the matter of the succession of daughters among Kalru Jats. Instances are cited of the exclusion of daughters by near collaterals; also of the succession of daughters in the presence of nephews and there are precedents vouched for where both daughters' and brothers' sons have succeeded together. The result arrived at therefore is that the decision must be in accordance with Muhammadan law, and the claim has been decreed accordingly. It will be noticed that the above result as to the non-existence of any uniform custom is practically the same as that arrived at, after a full enquiry, in Civil Judgment No. 12, *Punjab Record*, 1889.

In arguing the defendants' appeal before us, the learned counsel for the appellants attempted to show us that the first Court was in error in gauging the value of many of the instances cited upon either side, and that in contradiction of the view of the local commissioner, the District Judge had accepted precedents as in plaintiffs' favour, which if properly understood, support the defendants' contention, and had also excluded from consideration many cases directly in defendants' favour. On the other hand, the respondents' pleader contended that a review of all the cases cited would show that a net result still more favourable to plaintiffs than that arrived at by the first Court, was deducible.

The provision in the *Wajib-ul-arz* relied upon by the appellants' counsel does not, we think, affect the case much, either one way or the other. It does not purport to deal with the question really before the Court, referring only to the respective rights of the widow and the male collaterals. On the other hand, the provision in the *Riwaj-i-am* is remarkable. It is to the effect that among Kalrus, if there are brothers' sons they and the daughters take half each: if there are no brothers' sons the daughters take all, but no examples can be given. We do

not lay much stress upon this entry as laying down the true custom applicable to the parties, but rather as indicating, as the Courts have found, that there is no invariable customary rule, and that many cases have resulted in a mutual compromise.

After giving full attention to the argument on both sides, we arrive at the conclusion that the Courts below have rightly held that no established custom is proved which can govern the case, and that therefore Muhammadan law must be applied, not because we believe that it is the rule usually followed by the parties, but by reason of the enactment in Section 5 of the Punjab Laws Act. Whatever errors in detail may be ascribed to the first Court's statements of the general result of all the precedents cited, the fact remains that a very wide diversity of practice has been shown to exist in the matter of inheritance to sonless proprietors who have died leaving both daughters and near collaterals, which renders it impossible to hold that there is any uniform customary rule.

The appeal is dismissed with costs.

Appeal dismissed.

No. 117.

HAMIR SINHG,—(PLAINTIFF),—APPELLANT,

Versus

**KHUSHAL SINGH, AND BUR SINGH,— } RESPON.
(DEFENDANTS,)—AND RODU,—(PLAINTIFF), } DENTS.**

} APPELLATE SIDE.

Case No. 587 of 1891.

(STODDON AND BULLOCK, JJ.)

Custom—Alienation—Childless proprietor—Gift to son-in-law—Mahtons of mauza Bham, tahsil Garshankar, Hoshiarpur District.

Found in a suit the parties to which were Mahtons (Hindus) of the village of Bham in the Garshankar tahsil of the Hoshiarpur District, that there was a presumption against the validity of a gift by a sonless proprietor to his son-in-law, and that the presumption had not been rebutted.

Punjab Record, No. 75 of 1891 and No. 14 of 1892, referred to.

Further appeal from the decree of R. L. Harris Esquire, Divisional Judge, Hoshiarpur, dated 6th April 1891.

Krishna Singh, for appellant.

Bates, for respondents.

The parties to the suit were Mahtons of the village of Bham in the Garshankar tahsil of the Hoshiarpur District.

In 1881 one Jowahir, having no son, alienated his land (174 kanals 4 marlas) by gift to his son-in-law Rura. Rura died not long after, and mutation of names was effected in favour of his widow, Mussammat Bannon, daughter of Jowahir. Jowahir died next, and Mussammat Bannon died recently, whereupon the defendants, Khushal Singh and Bur Singh, brothers of Rura, obtained possession of the land.

The plaintiff, Hamir Singh, a collateral, descended from the great grandfather of Jowahir, sued for possession, basing his claim on two grounds : (a) that the alienation by Jowahir was invalid by custom ; and (b) that even if valid, the land gifted to Rura reverted to Jowahir's heirs on the death of Rura without issue and did not pass to Rura's heirs.

The plaintiff joined as a defendant one Rodu, who was also a collateral of Jowahir, but made no claim.

The first Court found that the defendants, upon whom it placed the onus, had not established that by custom gifts in favour of resident sons-in-law were valid ; and that the property reverted to the heirs of the original donor.

The Divisional Judge, upon appeal, dismissed the plaintiff's suit with costs throughout : he placed the onus upon the plaintiffs to show that the gift was invalid, and held that they had not discharged the onus.

Hamir Singh, plaintiff, appealed to the Chief Court. At the preliminary hearing of the appeal, Mr. Justice Roo recorded the following interlocutory order and admitted the appeal for hearing by a Bench —

“ If the validity of the gift to Rura were now the point in dispute, I should be inclined to agree with the first Court. Both Courts agree that Rura was not a resident son-in-law.

“ But assuming the gift to Rura to be valid, or not now open to objection, the strong presumption is that the land now passes to the heirs of the donor and not to Rura's collaterals.

“ The general principle is this : the land is not the absolute property of the individual holder, but part of a joint property in which all the descendants of the common ancestor have a reversionary interest, — thus, custom sometimes forbids any interference at all with this reversionary interest, *e. g.*, it entirely forbids adoption or gift or alienation except for necessity. More commonly it allows adoption or gifts in favour

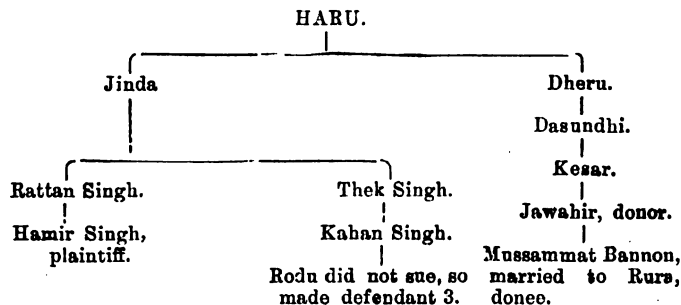
“ of a selected reversioner, *e. g.*, in favour of one of the yak-jaddis. Often a further step is made and daughters, and even sisters, or their husbands or sons, are admitted, and of course when admitted the succession passes to their lineal descendants. But this is really only a recognition of a limited right of succession in the female line : the husband is a mere adjunct to the daughter or sister and to give *his* collaterals, who, as regards the village proprietary body are perfect strangers, a right of succession, is a violation of all the principles on which the custom regulating the tenure and devolution of land is based. Of course, there may be cases in which the husband's collaterals can prove such a right of succession, but this does not seem to be one of them.”

The judgment of the Chief Court, finding that there was a presumption against the validity of the gift to Rura, which had not been rebutted, was delivered by

STODDON, J.—The questions for decision in this case are— 18th June 1892.

- (a.) Whether a gift of ancestral land made by Jowahir, a childless Mahton proprietor, to his son-in-law Rura, in 1881, is valid by custom ?
- (b.) Whether, if it is valid, the persons entitled to inherit the land on the death of Jowahir and his wife, without issue, are the collaterals of the donor, or those of the donee ?

The parties are Mahtons of the village of Bham in the Garhshankar tahsil of the Hoshiarpur District. The following table shows the relationship of the plaintiff Hamir Singh to the donor Jowahir—



In 1881 Jowahir had mutation of the land in dispute effected in favour of Rura. On Rura's death it was effected in favour of his widow, Mussammat Bannon. She died a short time ago, and then Rura's brothers took possession of the estate Hamir Singh sued them for possession and obtained a decree

from the first Court, which found points (a) and (b) in his favour. On appeal, the Divisional Judge found point (a) against him and dismissed the suit. He has appealed to this Court. It should be noted that Rura and his brothers originally belonged to the village of Mahadpur in the Hoshiarpur tahsil. They owned no land there, and, on Rura's marriage, they all appear to have migrated to Bham, and are now residents of that place.

There are conflicting rulings on the question of the power of a childless Mahton proprietor to alienate his ancestral land, most of which were considered in a judgment of this Court published as *Punjab Record* No. 75 of 1891, in which it was held that there was no established custom among Mahton Rajputs of the village of Nadalan in the Garshankar tahsil, whereby a childless proprietor can, in the presence of near collaterals, sell his land to a stranger. The judgment in Civil Appeal, No. 2342 of 1888, referred to by the first Court is hardly in point, as it had no reference to an alienation by a childless proprietor. In the present case, the *Riwaj-i-am* declares that the custom of gift of ancestral land does not obtain amongst the Mahtons, and further specifies that a father-in-law cannot validly gift his land to his son-in-law; and that a man does not obtain any right to his father-in-law's property by living as his ghar jawai. The *Wajib-ul-arz* of the first settlement allows alienations by way of sales, mortgage or gift, for necessity, and the possibility of a gift being made for necessity has been recognized by this Court in a judgment published as *Punjab Record* No. 14 of 1892. The Courts below have concurred in finding that Rura was not a khanadamad of Jowahir because he was in the Police and did not live with Jowahir, but the test appears to be whether Jowahir's daughter continued to live in Jowahir's house after her marriage, and considering that the whole of Rura's family migrated to Bham, the probability is that she did not leave her father's house, and that her husband was kept in it as a khanadamad, but this fact does not help defendants because a gift to a khana-damad is declared to be invalid by the *Riwaj-i-am*, and, if it is valid, then on the principles enunciated in a Full Bench decision of this Court, published as *Punjab Record* No. 12 of 1892, the right of succession on the death of Rura and his wife without issue, would certainly accrue to Jowahir's collaterals and not to those of Rura. On the whole, we consider that there is a presumption against the validity of the gift, and it is not contended that that presumption has been rebutted. Respon-

dents' counsel asks us to direct further inquiry to be made, but his clients have no further evidence to offer, and they cannot even say whether there is any probability that evidence in support of the validity of the gift would be forthcoming. We do not therefore consider that there is any necessity for further investigation. We hold that the presumption is against the validity of the gift, and that presumption has not been rebutted. We therefore accept the appeal and restore the decree of the first Court with costs throughout.

Appeal allowed.

— — —
No. 118.

SETH RAM RATTAN AND RATHI RAM LAL,—
(DEFENDANTS),—PETITIONERS,

Versus

SUNDER DAS,—(PLAINTIFF),—RESPONDENT.

Case No. 1142 of 1891.

(RIVAZ AND BULLOCK, JJ.)

} REVISION SIDE.

Jurisdiction—Small Cause Court—Withdrawal of suit pending in, and determined by District Judge—Objection as to jurisdiction.

In a suit heard and determined by a competent Court, the parties having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction of the Court on the ground of irregularities in the initial proceedings, which, if objected to at the time, would have led to the dismissal of the suit.

Ledgard v. Bull, I. L. R., 9 All., 191, (Privy Council Case) referred to and followed.

Petition under Section 25, Act IX of 1887, for revision of the decree of W. A. Harris Esquire, District Judge, Lahore, dated 2nd May 1891.

P. C. Chatterjee and Ishwar Das, for petitioners.

Golak Nath and Gobind Ram, for respondent.

This suit to recover Rs. 500 was originally instituted in the Cantonment Small Cause Court of Meean Meer.

The Cantonment Magistrate and Judge Small Cause Court had powers under Section 8, Act XIII of 1889, to hear and determine suits within the limit of Rs. 500 in value, but after the institution of the suit he was transferred, his successor being invested with powers up to Rs. 50 only.

The suit was thereupon withdrawn by the District Judge, Lahore, to his own Court, and was tried and determined by him as a Court of Small Causes (Section 25, Civil Procedure Code).

The District Judge (Mr. W. A. Harris) eventually made a decree in favour of the plaintiff.

The defendants applied to the Chief Court on the revision side, contending that the District Judge had no power :

- (a) to withdraw the case from the Small Cause Court to the file of his own Court and hear and determine it himself ;
- (b) to hear and determine the suit so withdrawn after the appointment of a Judge to the Small Cause Court at Meean Meer with powers up to Rs. 500.

The judgment of the Chief Court was delivered by

18th July 1892.

BULLOCK, J.—This suit was instituted in the Meean Meer Small Cause Court and was thence transferred by order of the District Judge of Lahore into his own Court. It was tried in the usual way and a decree was made. The defendant applies for revision of the District Judge's order and bases his principal objection upon the ground that the District Judge had no power to transfer the suit with reference to Sections 23 and 34 of the Punjab Courts' Act and the Notification issued by the Local Government under the former Section (*No. 510, dated 11th May 1887). The argument is that the transfer was ordered as a matter of administrative control, and that as the Divisional Judge is by the Notification deemed to be the District Judge for the purposes of Sections 24 and 28 of Act IX of 1887, he and not the District Judge was the competent person to order the transfer. We are not prepared to accede to the contention that the transfer of the suit was a mere matter of distribution and wholly administrative, but in any case we feel no doubt that the objection is not now open to the petitioner. In submitting to the District Judge's jurisdiction without objection he must be taken to have waived the objection, and he cannot raise it in the present subsequent proceeding.

* NOTIFICATION No. 510, dated 11th May 1887.

Under the provisions of Section 23 (b), Act XVIII of 1884, the Hon'ble the Lieutenant-Governor is pleased to declare that the Divisional Court shall be deemed to be the District Court for the purposes of Sections 24 and 28 of the Provincial Small Cause Courts' Act, IX of 1887.

The suit when brought in the Small Cause Court was validly brought and at no time was there any incompetency to entertain and adjudicate upon it: this being so, any initial defect there may have been must be held as cured by the petitioners' waiver. The case of *Ledgard v. Bull*, I. L. R., 9 All., 203, is a conclusive authority for holding the above. In that case it was held by their Lordships of the Privy Council established upon numerous authorities "that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit." In the present instance, there was inherent jurisdiction over the subject-matter of the suit from its inception. If the order for transfer be open to objection, it is open to objection for a reason which might at once have been set right by a formal application to the Divisional Judge, but having made no objection and having fully submitted to the jurisdiction and gone to issue and trial, the petitioner must be held to have waived any objection there may have been to the trial of the suit by the District Judge.

Upon the other grounds of the petition, we think it necessary only to say that we do not consider ourselves called upon to exercise our revisionary powers. Having all the parties before it, the Court was able to determine upon whom the liability should be fixed, and in fixing it upon the petitioner it has done full justice. We dismiss the application with costs.

Application refused.

No. 119.

GULAB SINGH,—(PLAINTIFF),—PETITIONER,—

Versus

KARAM,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 310 of 1892.

(BENTON & RIVAZ, JJ.)

Jurisdiction—Revision—Refusal of District Judge to issue a notice under Regulation XVII of 1806.

The District Judge refused to issue a notice under Regulation XVII of 1806, holding that the mortgage deed propounded was not a mortgage by conditional sale and therefore not within the scope of the Regulation.

The plaintiff applied for revision.

Held, overruling the District Judge as to the nature and construction of the document, that his order was under the circumstances open to revision.

I. L. R., 3 All., 576, referred to and followed.

Petition under Section 622, Civil Procedure Code, for revision of the order of W. B. DeCourcy Esquire, District Judge, Jhelum, dated 11th November 1891.

This was a petition under Section 622, Civil Procedure Code, praying for the revision of an order made by the District Judge, Jhelum (Mr. W. B. DeCourcy), refusing an application made to him by a mortgagee for the issue of a notice under Section 8, Regulation XVII of 1806, in reference to a mortgage of two kanals of land.

The District Judge refused the application, holding that the mortgage was not a mortgage by conditional sale and therefore did not fall within the purview of the Regulation.

The plaintiff applied to revise this order. The judgment of the Chief Court was delivered by

27th June 1892.

RIVAZ, J.—We have read the document propounded by the petitioner in this case, and find that it is clearly a deed of mortgage by conditional sale such as is contemplated by Regulation XVII of 1806. The District Judge was therefore obviously in error in refusing to issue the notice mentioned in the Regulation, and the only difficulty which we have felt is as to whether his erroneous order is open to revision. After consideration, we think that we have power to interfere under Section 622, Civil Procedure Code, and this appears to have been the view taken in a similar case reported in I. L. R., 3 All., 576. It would be anomalous if a mortgagee had no remedy where the District Judge had refused to act in accordance with law, as in the present case, without any apparent justification. The functions to be exercised under the Regulation are no doubt ministerial rather than judicial. But we consider that a District Judge assumes judicial functions when he proceeds to construe and interpret the document presented as a mortgage by conditional sale, and that at least in such case his proceedings are open to revision if he declines jurisdiction on clearly erroneous grounds.

We accept this application for revision and direct the District Judge to deal with the application before him in accordance with law.

The stamp on this application will be refunded. Other costs incurred must be borne by the petitioner

Application allowed.

No. 120.

MUHAMMAD HAYAT AND OTHERS,—(PLAINIFFS),—
APPELLANTS.

Versus

L ANGAR,—(DEFENDANT),—RESPONDENT.

Case No. 886 of 1891.

(FRIZELLE & BENTON, JJ.)

Custom—Alienation—Gift by childless Gujar of tahsil Gujrat to step-son.

Found in a suit the parties to which were Gujars of mauza Dittawal tahsil and District Gujrat, that a childless proprietor was not authorised by custom to make a gift of his land to his step-son in presence of sons of the donor's brothers.

Punjab Record, No. 39 of 1887; and Nos. 8 and 109 of 1891, referred to.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 1st May 1891.

The plaintiffs sued for a declaration that an alienation of 10 ghumaos 2 kanals and 11 marlas of land made by a childless Gujar proprietor of mauza Dittawal, tahsil and District Gujrat, in favour of his step-son was invalid after the death of the donor.

The plaintiffs were the donor's brothers' sons.

The Divisional Judge (Mr. F. Bullock) after making a remand under 566, Section Civil Procedure Code, dismissed the plaintiffs' suit. His opinion was as follows—

“The question is not one of inheritance by a pichlag: it is whether a childless proprietor can make a will in favour of one who is not an heir to the exclusion of his brothers' sons. The *Wajib-ul-arz* and *Riwaj-i-am* contain no express rule upon the point: they consider only the power to make gifts and are silent as to the power of making wills.

“There is practically no restriction upon the power of sale or gift and I think a restriction upon the power of bequest should, under the circumstances, be proved. I do not think this has been proved and I dismiss the (plaintiffs') appeal with costs.”

The plaintiffs preferred a further appeal to the Chief Court: the judgment of the Court finding that the alienation was a gift *inter vivos* and not a will and that the gift was not authorised by custom was delivered by

BENTON, J.—The question in this case is whether a childless Gujar proprietor of tahsil Gujrat may make a bequest 18th June 1892.

APPELLATE SIDE.

or gift in favour of his step-son. The Divisional Judge thought the case was one of bequest, but we are satisfied, after perusal of the document, that it is really a deed of gift, by which the property was intended to be conveyed in the proprietor's lifetime. Mutation of names accordingly even took place.

There was a question whether the donee was a son or step-son. The plaintiffs alleged that he was a step-son, and this point has been found in their favour by the Divisional Judge for, what we consider to be, sufficient reasons. There was a conflict of evidence, but the defendant Langar's conduct in executing such a document in his favour, which would have been entirely unnecessary if he had been a son, seems to show clearly which evidence is to be believed. The donee is described as a step-son in the mutation papers.

The plaintiffs, who are nephews, sue to have it declared that the disposition of the property shall not affect their reversionary interests.

The Divisional Judge dismissed their claim on the ground that the document was a will, and that the testator could alienate without restriction by sale or by gift, and that there being no mention of a will in the records of custom, any restriction as to the power to make a will should be proved.

We do not find anything on the record to shew that a childless Gujar proprietor has an unrestricted power of gift or sale in the Gujrat tahsil, and we understand that the same restrictions as regards alienation prevail there as elsewhere, speaking generally. The donee in this case can only be regarded as an entire stranger. In *Punjab Record*, No. 8 of 1891, it was found, after full consideration, that there was no power to give to one nephew in preference to another. All the more, there would be no power to give to a stranger in presence of nephews. In Appeal No. 33 of 1891, it was found in the case of Jats of tahsil Phalian, who are on the same footing according to the *Riwaj-i-am* as Gujars, that a gift to a daughter, who was not the wife of a khanadam was void, and the same result was arrived at in reported cases, *Punjab Record*, No. 39 of 1887 and *Punjab Record*, No. 109 of 1891. The power of gift is therefore very restricted, and the defendants, on whom the burden of proof lay, have entirely failed to prove that the rule has not been correctly found in these cases.

We therefore accept the appeal, and decree the plaintiffs' claim—that the document impugned shall not affect their rights of succession—with costs in all the Courts.

Appeal allowed.

No. 121.

NARAIN DAS,—(PLAINTIFF),—APPELLANT,

Versus

KHAIR SHAH AND OTHERS,—(DEFENDANTS),

RESPONDENTS.

} APPELLATE SIDE.

Case No. 1203 of 1890.

(STODDON & BULLOCK, JJ.)

Limitation—Mortgage—Mortgagee in possession—Farm of land by Collector for non-payment of revenue—Suit by assignee of mortgagee for possession, on expiry of term of farm.

A mortgagee of two-thirds of certain lands obtained possession under his mortgage.

The proprietors having made default in payment of the land-revenue on the other share of the land, and the mortgagee also refusing to pay the said revenue, the land was farmed by the Collector under the revenue law to H. S. for a term of ten years. The farm continued from 1875 to 1885, when the representative of the mortgagors obtained possession.

On 17th August 1889, the assignee of the mortgagee sued for possession under the mortgage.

Held, that the plaintiff's suit was barred by limitation under Article 142, Schedule II, Limitation Act, 1877, and that H. S. was not in possession on behalf of the mortgagee but on his own account.

Further appeal from the decree of Khan Muhammad Hayat Khan, C.S.I., Divisional Judge, Mooltan, dated 23rd June 1890.

Gouldsbury, for appellant.

Oertel, for respondents.

The material facts of the suit out of which this appeal arises are these : On the 7th September 1867 Sadar Din and Yakub Shah mortgaged two-thirds of the half share of certain lands and wells belonging to them to Ramjas, defendant 2, for Rs. 2,550-0-0. The mortgagee was put in possession under the mortgage, but the owners, the mortgagors, having made default in payment of the revenue due on the remaining share of the land, and the mortgagee having also failed to pay the same, the Collector, in pursuance of the powers conferred by Section 47, Land Revenue Act, 1871, farmed the land to Haji Shah for a term of ten years (the farm having in the first instance been offered to and refused by the mortgagee), he undertaking to pay the revenue, and the usual malikana was reserved to the proprietors.

The farm to Haji Shah came to an end in 1885, when Khair Shah, the representative in title of the mortgagors, was put into possession.

In 1889, Ramjas, the original mortgagee, assigned his rights to his brother Narain Das, who now instituted a suit for possession, his suit being filed on the 17th August 1889.

The lower Courts held that the plaintiff's suit was barred by limitation and dismissed it.

In further appeal to the Chief Court, it was contended that Khair Shah must be held to have resumed possession from 1875 to 1885 on behalf of the mortgagee, who was the person entitled.

The judgment of the Chief Court upholding the view of the Courts below, that the suit was barred by limitation, was delivered by

24th June 1892.

SROGDON, J.—The land in suit, forming part of the lands held by Sadar Din and Yakub Shah, was mortgaged to Ramjas, and the mortgagee was in possession: he was liable to pay the revenue on the land mortgaged to him. The owners having fallen into arrear with the revenue due on the rest of their land and being unable to pay it, the whole land was offered to the mortgagee to hold for a term of years. He refused to take it: every effort was made to induce him, and he was warned that his mortgage rights would be prejudiced by his refusal but he adhered to his determination not to take the land, and on the 20th of November 1875 the Collector, acting under Section 47 of the Revenue Act then in force (Act XXXIII of 1871), put Haji Shah into possession for a term of ten years: he was to pay the revenue, and a malikana was reserved to be paid to the owner. The unmortgaged residue of the land had been kept kham for a year previous to 1875, and on the 13th May of that year the mortgagee was offered the whole of the defaulters' land and refused it, as has been stated above. It is thus clear that Ramjas ceased to be in possession in 1875. The farmer or lessee continued in possession till 1885 and in that year Khair Shah the representative in title of the mortgagors, was put into possession as the farm had come to an end. On the 29th of January 1889, Ramjas executed a deed purporting to convey his rights under the mortgage to his brother Narain Das, and the latter now sues for possession: he is met by a plea that the suit is barred under Article 142 of the Limitation Act.

By the terms of the mortgage the mortgagee was to remain in possession, take all crops, malikana and lambardari, and pay the revenue ; but ever since the commencement of the farm he has made no claim to the malikana and has allowed the proprietors to take it without protest. He has also received no lambardari nor derived any benefit from the land.

It is contended by the learned counsel for the appellant that Khair Shah must be held to have resumed possession for the mortgagee, who was the person entitled to possession, but it is clear that Khair Shah took possession on his own account and ignored any right in the mortgagee. The latter applied for possession in 1886 : it was refused him and he was referred to a suit, but no suit was brought and time was allowed to run on. There is good reason for thinking that the transfer to Narain Das is a colourable one. Ramjas had always represented his brother as a co-mortgagee and his alleged transfer to him as by a sole mortgagee is unintelligible. However this may be, it is clear that when Khair Shah took possession, he excluded the mortgagee from all benefits under the mortgage. The Privy Council case reported at I. L. R., 17 Calc., 137, is cited for the respondents, but there is this difference between it and the present case, that in the former the defendant's possession had continued for the prescribed time, while in the present suit it has not. We think, however, that Ramjas completely abandoned his rights to possession in favour of the proprietors in 1875 as found by the first Court. He took no step to keep them alive ; he acted in a manner inconsistent with an intention to derive any benefit from the land, and allowed what was due to him as mortgagee to be paid to the proprietors, and not only was this the case, but there was an express abandonment. He was dispossessed with notice that his right to possession was no longer acknowledged ; he acquiesced in its determination and left the land with a disclaimer of intention to hold possession and with an express intimation that he would resort to a suit for recovery of the money due to him as his sole remedy. A suit for possession by him or his assigns cannot now be maintained and we therefore dismiss the appeal with costs.

Appeal dismissed.

No. 122.

APPELLATE SIDE. }

KADMAN,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT AMIR BIBI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Case No. 1030 of 1891.

(FRIZELLE & STODDON, JJ.)

Custom—Alienation—Gift to daughters by sonless proprietor—Rights of brother of donor—Muhammadan Gujars, tahsil Kharian, Gujrat District.

Found in a suit the parties to which were Muhammadan Chuhan Gujars of tahsil Kharian in the Gujrat District, that a gift of all his land by a sonless proprietor to his daughters in the presence of a brother of the donor was invalid by custom.

Punjab Record, No. 106 of 1886 and No. 39 of 1887, referred to.

Further appeal from the decree of R. L. Harris Esquire, Divisional Judge, Jhelum, dated 30th July 1891.

A. L. Roy, for appellant.

Lakhshmi Narain, for respondents.

The plaintiff sued for a declaration that a gift of all his ancestral property made by a sonless Chuhan Gujar (Muhammadan) of mauza Khori in the Kharian tahsil of the Gujrat District was invalid by custom.

The plaintiff who challenged the gift was the brother of the donor, the donees being the donor's two daughters.

The first Court (Khan Ahmed Shah, Subordinate Judge) found that the gift was invalid. He said: "Clause 6 of the *Wajib-ul-arz* shows that if a sonless person desires to give his land to his daughter, he can give her a part of it as dowry. "Hence, if a person gift the whole of his land to his daughter, the burden of proving the validity of the gift lies on the donor and the donee. For this reason the burden of proving the issue rests on the defendants who have not cited any instance to show that a sonless Gujar is competent to gift his ancestral land to one or several daughters to the exclusion of his own brother. Moreover, the defendants have failed to prove that a gift like the one in question can be made in consideration of services; nor have they proved that any special service was rendered by the daughters to the donor."

The Divisional Judge (Mr. R. L. Harris) reversed the first Court's decree and dismissed the plaintiff's suit on the follow-

ing grounds: "The *Wajib-ul-arz* and *Riwaj-i-am* are both in favour of the validity of the gift. The lower Court has misconstrued the former, and has dismissed the latter from consideration as not carrying weight. It decreed the plaintiff's claim on the authority of a ruling of this Court of 15th March 1888, and a decision of its own of 2nd March 1890. The former is a case of a gift to a sister's son and is not applicable. In the latter, my predecessor held a gift invalid on the ground that the *Riwaj-i-am* did not support it.

"There is a decision in favour of an exactly similar gift, dated 15th March 1886, the parties being Gujars of the same tahsil and the party disputing the gift a brother of the donor. The appeal was rejected in Chambers in the Chief Court (No. 1316 of 1886).

"In *Punjab Record*, No. 106 of 1886, the custom was distinctly recognised. The onus, if ever upon the defendants, has most certainly been shifted to the plaintiffs. It is to be noted that the clause (10) of the *Riwaj-i-am* setting forth the custom, is based upon cited instances, and so is not a mere dead letter, and the plaintiff has failed to show the custom to be invalid."

The plaintiff appealed to the Chief Court. The judgment of the Court reversing the decree of the Divisional Judge and restoring that of the first Court was delivered by

FRIZELLE, J.—The parties are Muhammadan Gujars of the *13th July 1892.* Kharian tahsil of the Gujrat District, and the question for decision is whether a sonless proprietor of this tribe can make a gift of the whole of his land, in the presence of a brother, to daughters who do not live with him and whose husbands do not live with him. After considering the *Wajib-ul-arz* of the former settlement and Section 10 of the *Riwaj-i-am*, which has several times been the subject of decision in this Court, and also the other evidence produced by the parties, we are of opinion that the donor had not this power. In *Punjab Record*, No. 39 of 1887, it was held with reference to the *Riwaj-i-am* now in question that gifts to daughters whose husbands are resident with the donor are valid by custom, but not those to daughters whose husbands are not so resident. We can find no reason for departing from that ruling in the present case. *Punjab Record*, No. 106 of 1886, which the Divisional Judge quotes, is against him. In that case it was recognized that a Gujar of the Kharian tahsil cannot gift his

land to a daughter not residing with him, and in No. 1316 of 1886 of this Court, on which also the Divisional Judge relies, the donees seem to have resided with the donor. The *Wajib-ul-arz* of the former settlement only allows a gift of a small quantity (*kisi kadr*) of land to a daughter by way of marriage present and the like. We are therefore of opinion that the first Court was right in holding the gift to be invalid as against plaintiff after the death of Kammun, the donor. We reverse the decree of the Divisional Judge, and restore that of the first Court. Defendants to pay costs in all the Courts.

Appeal allowed.

No. 123.

**MAHBUB SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,**

APPELLATE SIDE.

Versus

KAHNA,—(DEFENDANT),—RESPONDENT.

Case No. 570 of 1891.

(BENTON & STOGDON, JJ.)

Appeal—Appeal by plaintiffs to Chief Court who did not appeal to Divisional Judge—Competency of appeal.

Eighteen persons instituted a suit for an account against seventeen others. The first Court dismissed the suit.

Two of the plaintiffs appealed to the Divisional Court, and, after a remand under Section 566, Civil Procedure Code, a decree was made in their favour against defendant 1 for Rs. 103-8-0 being the proportion to which they were held entitled out of a total sum of Rs. 1,457-5-0 for which defendant was found to be liable.

Some of the other plaintiffs, who had not appealed to the Divisional Court, then preferred a further appeal to the Chief Court urging that the Divisional Judge should have given them a decree for their proportionate share.

Held, that such further appeal was not competent, the appellants not being parties to the appeal before the Divisional Judge, nor affected in any way by the decree made by him.

[*Cf. Punjab Record*, No. 46 of 1892.]

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 15th December 1890.

Lal Chand, for respondent.

Harnam Singh and seventeen others instituted a suit against Kahna and sixteen others for an account. The plaintiffs were the pujaris and sharers in the income of the Keshgarh gardawara at Anandpur in the Una tahsil of the

Hoshiarpur District. They alleged that the surplus of the gurdawara was divided annually into 118 shares, of which they, the plaintiffs, got 61, and the defendants, Nos. 2 to 17, 57 shares.

The plaintiffs further alleged that defendant 1, the treasurer of the institution, had rendered no account to them for the twelve years ending Sambat 1944, and they prayed for an account, with a decree for any amount that might be found due to them.

The first Court (Lala Shib Lal, Munsif, 2nd class) found that there was no surplus in the hands of defendant 1, and dismissed the plaintiffs' suit.

Two of the plaintiffs, Harnam Singh and Sarmukh Singh, appealed to the Divisional Judge. A remand was directed under Section 566, Civil Procedure Code, and after a return being made thereto a decree was made in favour of the two plaintiffs-appellants for Rs. 103-8-0 to be paid by Kahna, defendant, out of a sum of Rs. 1,457-5-0 for which the Court considered him liable.

Eight of the plaintiffs, who had preferred no appeal to the Divisional Judge, filed a further appeal from his decree in the Chief Court. The judgment of the Court, holding that such appeal was incompetent as they were not parties to the appeal before the Divisional Judge, was delivered by

STODDON, J.—Harnam Singh and seventeen others, pujaris and sharers in the income of the Keshgarh gurdawara at Anandpur in the Hoshiarpur District, sued Kahna, treasurer of the gurdawara, for an account and for a decree for any sum which might be found to be due to them. They originally fixed the amount of their claim at Rs. 150, but it appears probable that they subsequently amended their plaint and claimed Rs. 1,000. The amended plaint is not, however, forthcoming, and is said to have been burnt. Certain of the pujaris who did not join in the claim were made co-defendants. There are said to be one hundred and eighteen shares in the divisible income, of which plaintiffs are entitled to sixty-one, and defendants, Nos. 2 to 17, to fifty-seven. 12th July 1892.

The first Court dismissed the suit of the plaintiffs: only Harnam Singh and Sarmukh Singh appealed to the Divisional Judge, who, after a long investigation, decided that Kahna was liable for a sum of Rs. 1,457-5-0. He however declined to recognize Harnam Singh and Sarmukh Singh a

appealing on behalf of their co-plaintiffs and passed a decree in their favour for the amount of surplus income assignable to their twelve and a half, out of one hundred and seventy-six shares, viz., for Rs. 103-8-0.

Of the other plaintiffs, Mahbub Singh, Mussammat Bhagan, Hamir Singh, Narain Singh, Bhup Singh, Hira Singh I, Chet Singh and Hira Singh II, appealed to this Court, urging that the Divisional Judge should have given them a decree for the sums found to be due to them. They were directed to apply to the Divisional Judge for a certificate. They complied with this direction, but their application was rejected. They then applied to this Court for revision, and as the case was held to be an unclassified suit of value exceeding Rs. 100, their application was admitted as a further appeal.

We consider, however, that the present appellants are not entitled to maintain the appeal, as they were not parties to the appeal before the Divisional Judge, nor are they in any way affected by the decree passed by him. In a somewhat similar case reported as I. L. R., 8 Mad., 192, the learned Judge expressed doubt as to whether a defendant who was a party to a case in the first Court, but who had not appealed from its decree to the Subordinate Judge, had a right of further appeal to the High Court from the decree of the Subordinate Judge. They, however, exercised their revisional jurisdiction under Section 622, Civil Procedure Code, and directed the Subordinate Judge to consider whether in the reasonable exercise of his powers under Section 544, the decree should not be set aside as against the non-appealing defendant. We cannot, however, in this case revise the decree of the Divisional Judge, because it is clear that he considered the provisions of Section 544, and held that Harnam Singh and Sarmukh Singh were not entitled to ask for a decree for amounts not due to them, but to their co-plaintiffs, who had not appealed.

According to Section 40, sub-section 1 (d) of the Punjab Courts Act, the only persons entitled to apply for certificates are parties to appellate decrees of Divisional Courts. Appellants were not parties to the decree appealed against and were not therefore entitled to apply for a certificate.

For the above reasons, we must dismiss this appeal with costs. The cross-objection also fails as it could only be made against Harnam Singh and Sarmukh Singh, who have not appealed, and it is dismissed.

Appeal dismissed.

No. 124.

SAIFUL RAHMAN,—(PLAINTIFF),—APPELLANT,

Versus

UMAR-UD-DIN,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Case No. 398 of 1891.

(RIVAZ & BULLOCK, JJ.)

Section 13, Explanation II, Civil Procedure Code, 1882—Res judicata—Matter which ought to have been made ground of defence in former suit.

Section 13, Explanation II, Civil Procedure Code, 1882, which provides that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit, does not further declare that such matter shall be deemed to have been heard and finally decided.

The Explanation was not intended to enable a party to treat a point as having been decided in his favour in a former suit which was in fact not so decided. It applies rather to a case where the defendant has a defence which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward the suit was decreed against him.

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Hoshiarpur, dated 16th January 1891.

Oertel, for appellant.

Krishna Singh, for respondent.

The plaintiff and the first five defendants were the record-owners of 13 kanals 9 marlas of land in Basi Kalan, tahsil Hoshiarpur, containing a mosque, some trees and a well. Some of the defendants, it was alleged, without the consent of the plaintiff, cut down some of the trees and sold them to the other defendants.

The plaintiff therefore sued for a declaration that he was the sajada-nashin of the mosque; that the trees were attached to the mosque for the benefit of the public; and that the defendants had no right to cut down trees without plaintiffs' consent.

The defendants pleaded that the trees were not planted by the plaintiff or his father, but were the joint property of the plaintiff and defendants; that the trees were not attached to the mosque; and that neither the plaintiff, nor his ancestor, was sajada-nashin of the mosque.

The first Court (Lala Shih Narain, Extra Assistant Commissioner) granted the plaintiff the relief asked for, overruling an objection that the suit was barred by reason of an adjudication in a former suit between the parties in Pundit Som Dat's Court, in which the then plaintiff, now defendant, sued for and obtained a decree for joint possession of certain land. The Divisional Judge (Mr. F. C. Channing) upon appeal directed that the words "sajada-nashin and" be struck out of the first Court's decree, leaving the parties in the position of the co-sharers in a property which might be partible or impartible. His reasons were as follows :—"There was a former suit between the parties to this case in which the then plaintiff, now defendant-appellant, sued for and obtained a decree for joint possession of 13 kanals 9 marlas of land, khasra No. 227. If the present plaintiff's, then defendant's, allegation that this land is attached to the mosque of which he is sajada-nashin would have been an answer to that suit for possession, he was bound to put forward that plea then, and as he did not do so, the matter would be *res judicata* under Explanation II, Section 13, Civil Procedure Code."

The plaintiff preferred a further appeal to the Chief Court contending (a) that the Divisional Judge was wrong on the question of *res judicata*; and (b) that there was no estoppel and nothing to bar the present suit.

The judgment of the Chief Court reversing the decree of the Divisional Judge and restoring that of the first Court, was delivered by

15th July 1892

RIVAZ, J.—We cannot agree with the Divisional Judge that the issue whether or no plaintiff is the sajada-nashin is concluded by the decision in the previous suit.

In the first place, we do not think that it has been established that the plea, that plaintiff is sajada-nashin, is one which might and ought to have been made a ground of defence in the former suit. That suit was by the present defendants to establish their right to joint possession of certain land included in the present suit. The decree was in favour of the then plaintiffs (now defendants). In the present suit the defendant in the earlier suit sues as sajada-nashin and co-sharer to restrain the defendants (the former plaintiffs) from cutting and appropriating to their own use trees growing on the joint land. Both Courts agree in decreeing the claim, but whereas the first Court has decreed in plaintiff's favour as co-sharer

and *sajada-nashin*, the Divisional Judge has varied the decree by the exclusion of the words italicised. In our opinion it cannot be assumed that a plea alleging the present plaintiff's status as *sajada-nashin* would have been an answer to the former claim for joint possession. Persons other than the *sajada-nashin* may have rights as co-sharers in land connected with a shrine, and there is nothing to indicate that in the case of this particular *khankah* the *sajada-nashin* (if such exists) would be exclusive owner of all property attached to the institution.

In the next place it must be remembered that although Explanation II to Section 13, Civil Procedure Code, provides that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit, the Explanation does not further declare that such matter shall be deemed to have been heard and finally decided. The explanation was not, as pointed out in *Ghursobhit Ahir v. Ramdutt Singh* (I. L. R., 5 Calc., 923), intended to enable a party to treat a point as having been decided in his favour in a former suit, which was in fact not so decided. It applies rather to a case where the defendant has a defence which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward, the suit was decreed against him. In such case he is as much bound by the adverse decree as if he had set up the defence, and he is equally estopped from setting up that defence in any future suit under similar circumstances. In the present case, it is to be observed that plaintiff does not raise the question, which it is urged he should have pleaded as defendant in the former suit, with a view to re-opening anything decided against him either expressly or by implication in that suit. He accepts the former decision, and bases his claim on the rights found to exist therein, coupled with the additional allegation that he is *sajada-nashin* as well as co-sharer. We think it impossible to hold that the question, whether he is the *sajada-nashin* was heard and decided in the former suit. It was not expressly mentioned and is not necessarily concluded by what was finally decided in that case, to ascertain which we must examine both the judgment and the decree (*Kali Krishna Tagore v. Secretary of State*, I. L. R., 16 Calc., 173, P. C.).

As to whether plaintiff was rightly found by the first Court to be in fact the *sajada-nashin*, we allowed the respon-

dent's counsel to address us, though this question was not distinctly made a ground of appeal in the Divisional Court; but he could urge nothing which throws any doubt upon the correctness of the view taken by the first Court.

We accept this appeal and restore the decree of the first Court with costs.

Appeal allowed.

No. 125.

REVISION SIDE.

HASSAN ALI SHAH,—(DEFENDANT),—PETITIONER,

Versus

SALIG RAM AND ANOTHER,—(PLAINTIFFS),—(RESPONDENTS).

Case No. 633 of 1891.

(FRIZELLE & STOGDON, JJ.)

Civil Procedure Code, Section 622,—Order under Section 108 of the Code setting aside an ex parte decree—Revision.

An application was made to revise an order made under Section 108, Civil Procedure Code, setting aside an *ex parte* decree, such order being made nearly seven years after the date of the decree ;

Held, following *Punjab Record*, No 114 of 1883, that no application under Section 622 of the Code would lie. The suit was one in which an appeal would lie, and by the word "case" the whole suit is meant.

Petition under Section 622, Civil Procedure Code, 1882, for revision of the order of Sayad Abid Hussain, Munsif, 1st class, Jullundur, dated 19th March 1891.

Madan Gopal, for petitioner.

Lal Chund, for respondents.

This was a petition under Section 622, Civil Procedure Code, for revision of the order of Sayad Abid Hussain, Extra Assistant Commissioner, Jullundur, made under the following circumstances : On the 16th May 1884, Salig Ram and Balik Ram obtained an *ex parte* decree against Sandhi Shah for possession of 13 bigas 9 biswas of land, which had been mortgaged to the plaintiffs and in connection with which they had taken foreclosure proceedings under Regulation XVII of 1806.

Salig Ram and Balik Ram sold their rights under the decree on 12th August 1886 to one Sada Mal, but Hassan Ali Shah, defendant in the present suit, obtained a decree for pre-emption on 13th December 1887.

On 5th November 1887, Sandhi Shah, the original defendant, applied under Section 108, Civil Procedure Code, to the Court which made the decree of 16th May 1884 for an order to set it aside, and on the 19th March 1891 the application was granted, that is, nearly seven years after the date of the decree.

Hassan Ali Shah moved the Chief Court on the revision side under Section 622, Civil Procedure Code, to set aside the order cancelling the *ex parte* decree. It was objected that revision could not be obtained because the case was not one in which no appeal lay.

The judgment of the Chief Court refusing the application as inadmissible, was delivered as follows—

STODON, J.—Sandhi Shah had mortgaged 13 bighas 9 biswas of land by conditional sale to Salig Ram and Balak Ram. They had a notice issued to him under Section 8, Regulation XVII of 1806, and as he failed to pay the mortgage money within the year of grace, they sued him for possession of the mortgaged land on the allegation that the mortgage had been foreclosed and the conditional sale had become absolute. They obtained an *ex parte* decree on the 16th May 1884 from the Court of Sardar Yar Muhammad Khan, Extra Assistant Commissioner. On the 12th August 1886, they sold their rights under it to one Sadu Mal, against whom Hassan Ali Shah, the present petitioner, obtained a decree for pre-emption on the 13th December 1887. On the 5th November 1887, Sandhi Shah applied under Section 108, Civil Procedure Code, to the Court to set aside its *ex parte* decree. The case remained pending for a long time owing to its having come before various Courts, including this Court, but eventually on the 19th March 1891 Sayad Abid Hussain Khan, 1st grade Munsif, set aside the *ex parte* decree of the 20th June 1884 and appointed a day for proceeding with the suit. 14th July 1892.

Hassan Ali Shah applied to this Court under Section 622, Civil Procedure Code, to set aside the Munsif's order on the ground that he acted with material irregularity in setting aside the *ex parte* decree after seven years, execution having been taken out to the knowledge of the judgment-debtor. It is objected for respondents that the application cannot be entertained, because the case is not one in which no appeal lies (of the nature referred to in Section 622, Civil Procedure Code) to the Chief Court. The word "case," it is contended,

must be construed as referring to the suit for possession of land and not as referring to the proceeding for setting aside the *ex parte* decree which is not an independent case, but merely a branch of a case or a proceeding in a case. This contention is traversed by petitioner. Several decisions have been quoted by respondent's counsel in support of his argument. They are published at page 520 of the 3rd edition of O'Kinealy's Civil Procedure Code. Respondent's counsel relies on L. L. R., 14 Calc., 768 and I. L. R., 7 All., 345, but in the latter decision the point now in dispute does not appear to have been considered, and it is not clear whether the suit, in which the application to set aside an *ex parte* decree was granted, was one in which an appeal lay to the High Court. The former decision is in petitioner's favour, and Mr. Justice Norris ruled that the word "case" in Section 622, Civil Procedure Code, was wide enough to include an interlocutory order and that the words "record of any case" included so much of the proceedings in any suit as related to the interlocutory order. It is extremely doubtful whether the Legislature intended to give the High Courts such extensive powers of interfering with non-appealable orders of all descriptions passed by the subordinate Courts in appealable suits or proceedings, considering that the appellate Courts are armed with sufficient powers to deal with such orders by Section 591, Civil Procedure Code. It appears however to have escaped the notice of counsel that it has been ruled by this Court in a case published as *Punjab Record*, No. 114 of 1883, that the word "case" in Section 622 must be construed to mean the whole case and not a branch of it. The ruling is applicable to the present proceeding for it is admitted that the suit is one in which an appeal lies to this Court. If therefore by the word "case" the whole suit is meant, it is clear that this Court has no jurisdiction to revise an order which is merely a branch of the case. I confess that I do not see sufficient grounds for giving to the word the more extended meaning which petitioner's counsel asks us to attach to it, and I do not think that it is expedient that this Court should interfere on the revision side when it is clear that petitioner can, if the suit is decided against him on the merits, raise the whole question of the propriety of the order setting aside the *ex parte* decree in his petition of appeal to the Divisional Judge. It is true that this Court has in a decision published as *Punjab Record*, No. 21 of 1885, held that it is open to it to exercise its powers under Section 622, Civil Procedure Code, in cases of rejection of applications to appeal in *forma pauperis* under

Section 592, Civil Procedure Code, but such applications seem to me to be perfectly independent of the appeals which they seek to initiate free of cost. The same cannot be said of applications to set aside *ex parte* decrees, which are intimately connected with the suits in which those decrees were passed. Section 108, Civil Procedure Code, provides that in any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside. This wording in my opinion tends to show that the application is only a proceeding in a case and not an independent case. For the above reasons, I see no reason to differ from the ruling contained in *Punjab Record*, No. 114 of 1883, and I would therefore decline to go into the merits of the application and would dismiss it with costs.

FRIZELLE, J.—I also do not see sufficient ground to differ from *Punjab Record*, No. 114 of 1883, and am of opinion that as an appeal lies to this Court in the case of which the proceeding now in question forms part, Section 622, Civil Procedure Code, does not allow revision of the order. 14th July 1892.

The application is dismissed with costs.

Application refused.

No. 126.

JALLA,—(JUDGMENT-DEBTOR),—APPELLANT,—

Versus

DOOLA,—(DECREE-HOLDER),—RESPONDENT.

Case No. 376 of 1892.

(FRIZELLE & STODDON, JJ.)

} APPELLATE SIDE.

Indian Limitation Act, 1877, Schedule II, Article 179—Decree made on a compromise that after expiration of fifteen years plaintiff would be entitled to possession.

A decree was made in a suit in accordance with a compromise between the parties: the defendants were to remain in possession of the land in suit for fifteen years as mortgagees in lieu of their expenditure and losses during the plaintiff's absence, and on the expiration of the fifteen years the plaintiff was to obtain possession.

On the expiry of the fifteen years, the plaintiff applied for execution of decree asking for possession of the land.

Held, that the application for execution was governed by Article 179, Schedule II, Limitation Act, 1877, and was barred, the time beginning to run from the date of the decree.

Punjab Record, No. 43 of 1878 (F. B.) referred to and followed.

Further appeal from the decree of T. O. Wilkinson Esquire, Divisional Judge, Amritsar, dated 11th February 1890.

K. P. Roy, for appellant.

Ganpat Rai, for respondent.

Doola, respondent, obtained a decree against the appellant and two other persons, that he was to be considered proprietor of a half share in a joint holding of 19 ghumaos 3 kanals 7 marlas of land: the defendants were to remain in possession for fifteen years as mortgagees in lieu of their losses and expenditure during the period of the plaintiff's absence: and on the expiration of the fifteen years the plaintiff was to obtain possession.

On the expiration of the fifteen years, the plaintiff applied for possession under the terms of the decree: it was objected that execution of the decree was barred by limitation.

The Divisional Judge (Mr. T. O. Wilkinson) held that execution was not barred by limitation. His reasons were as follows: "The parties compromised and agreed that the decree should not be put into execution for fifteen years. The decree passed was one for possession at the end of fifteen years. In other words, the decree was one for possession held in abeyance for fifteen years. The limitation would therefore run from the day fifteen years after the date of the decree. The decree was passed on the 25th November 1873 and it was put in execution in March 1889 or long before the period of three years from the date on which it was agreed that it should take effect. The executing Court rightly refused to go into the question how the decree was brought about. The functions of an executing Court are to execute a decree already framed, not to question the correctness of the decree. I dismiss the appeal with costs."

On further appeal the judgment of the Chief Court was delivered by

16th July 1892.

STODDON, J.—On the 25th November 1873, Doola obtained a decree against Rohela, Jalla and Mali that he was to be considered as proprietor of a half share in a joint holding of 19 ghumaos 3 kanals 7 marlas, and that defendants were to

remain in possession thereof for fifteen years as mortgagees in lieu of their expenditure and losses during the period of plaintiff's absence, and that after the expiration of fifteen years the plaintiff would be entitled to obtain possession.

After the expiration of fifteen years the decree-holder applied for execution of his decree. It was objected that the application was barred by limitation, and that the decree was one of a declaratory nature only and had been obtained by fraud. The Courts below declined to consider the question of fraud and overruled the two other objections. The judgment-debtors have appealed to this Court on a certificate granted to them by the Divisional Judge.

If the application is one for execution of a decree, as it purports to be, the limitation applicable is three years from the date of the decree, under Article 179 (1) of the Limitation Act. It is contended for respondent that the term "date of decree" means the date on which the decree became enforceable and not the date on which it was passed. This construction is in accordance with two rulings of the Bombay High Court published as I. L. R., 12 Bom., 23, and I. L. R., 13 Bom., 237, but it is opposed to the ruling of the majority of the members of a Full Bench of this Court published as *Punjab Record*, No. 43 of 1878. We see no reason for dissenting from the latter ruling, and we entirely concur in the judgment of Plowden, J. In I. L. R., 12 Bom., 23, the Limitation Act is not even referred to and the other ruling merely cites the former one with approval.

It is next contended that the application is really one under Article 178, Schedule II of the Limitation Act, for which no period of limitation is provided elsewhere in the Schedule or by the Code of Civil Procedure, Section 230; but it is clearly what it purports to be, *vis.*, an application for the execution of a decree, and therefore Article 179 applies and not Article 178.

We hold that the application is barred by limitation and therefore accept the appeal and reject the application; but as the conduct of the judgment-debtors in not delivering possession appears to be vexatious, we direct each party to pay its own costs throughout. Plaintiffs, if so advised, can sue for possession, the period for which the land was mortgaged having elapsed.

Appeal allowed.

No. 127.

APPELLATE SIDE. { MANGAL AND OTHERS,—(DEFENDANTS),—APPELLANTS,
Versus
GIRDHARI AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 934 of 1891.

(STOGDON & BULLOCK, JJ.)

Civil Procedure Code, Chapter III—Misjoinder—Trespass—Separate and independent acts of defendants.

Seventeen of the village proprietors sued thirty-six persons—co-sharers and non-proprietors—for a declaration that the defendants were not entitled to enclose certain lands of the village or to erect buildings thereon, and also praying for the demolition of the buildings so erected and restoration of the land to its original condition.

The building by each defendant was his separate and independent act,
Held, on farther appeal (the objection was taken in the Court of first instance) that the suit was bad for misjoinder.

[Cf. I. L. R., 14 Calc., 435.]

Further appeal from the decree of T. Troward Esquire, Divisional Judge, Delhi, dated 29th May 1891.

Oertel, for appellants.

Turner, for respondents.

In this case, seventeen of the proprietors of a village in tahsil Rewari, Gurgaon District, instituted a suit against thirty-six persons—co-sharers in the village and non-proprietors—for a declaration that they (the defendants) were not entitled to enclose certain lands of the village and to erect buildings thereon; also for an order directing the demolition of the buildings and restoration of the land to its original condition.

The defendants pleaded, *inter alia*, that the suit was bad for misjoinder, the cause of action (if any) against each defendant being separate and distinct.

The first Court ignored the plea of misjoinder and dismissed the plaintiffs' suit on the merits. The Divisional Judge on appeal decreed the plaintiffs' suit in part, varying the decree of the first Court in so far as to decree the plaintiffs' claim regarding the removal of certain gatwars. The decree appeared to be joint and several and no order was directed to any defendant in particular.

16th .

The defendants thereupon applied to the Divisional Judge for a certificate under Section 40, sub-section (1) (d), Punjab

Courts Act, which being refused, they applied to the Chief Court for revision under sub-section (2) of Section 40. The application for revision was admitted by a Judge at Chambers and was dealt with as a farther appeal.

The judgment of the Chief Court allowing the appeal on the ground of misjoinder, was delivered by

BULLOCK, J.—In this suit certain of the proprietors in a *22nd June 1892.* village sued a number of persons to declare that they are not entitled to enclose certain lands of the village, and to erect buildings upon them; and for an order enjoining them to remove all erections and restore the land to its original condition. The suit was dismissed by the first Court, but on appeal was decreed in part, and dismissed as to the remainder, and both the plaintiffs and the defendants appeal to this Court.

In the first Court, the defendants' plea included among other things an objection on the ground of misjoinder, and the Court did not dispose of the objection by an order, but heard the suit as brought, and dismissed the claim. On appeal, the Divisional Judge decreed it in part: the terms of the decree are that the order of the first Court is "varied in so far as to "decree plaintiffs' claim regarding the removal of the gatwars." Such a decree would be incapable of execution: no order is directed to any of the defendants. The decree as it stands appears to be joint and several, and, if of any efficacy, would make each defendant liable for the acts of each and all of the co-defendants, with which he had no concern.

The defendants consist of several classes of persons: some of them are co-sharers in the village with the plaintiffs: the others are non-proprietors belonging to different tribes. The building by each of the defendants was his separate and independent act, and it is obvious that the acts of the co-sharers may be justifiable upon grounds different from those which affect the non-proprietors. There is no community of interest between the defendants: the act of each created a cause of action, and the joinder of all the actions and persons in one suit was illegal. The objection is strongly urged before us, and we think it is a good objection. The proper course appears to be to make a joint order in both appeals, setting aside the proceedings of the lower Courts, and remanding the suit to the first Court, with a direction to it to call upon plaintiff to elect upon which cause, and against which defendant or defendants therein, he will proceed in the present suit, and to strike

the other actions and defendants out of the record. It is therefore ordered accordingly, and the case is remanded to the first Court. The stamp in appeal to this Court will be refunded and other costs will follow the event.

Appeal allowed.

No. 128.

APPELLATE SIDE. { KALU, A MINOR,—(PLAINTIFF),—APPELLANT,
Versus
MUSSAMMAT AISHA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Case No. 230 of 1892.

(STODDON & BULLOCK, JJ.)

Suit for custody of wife—Mussalman Gujars—Discretion of Court.

The plaintiff, a minor, sued through his father for custody of his wife.

The plaintiff was about ten years of age and the principal defendant, who was a widow, about thirty. It was alleged that the marriage took place when the plaintiff was four and the woman between nineteen and twenty-four.

Held, assuming the plaintiff to have become the husband of the woman, that the Court had a discretion to grant or refuse the order prayed for and the order ought in the first instance to be refused.

[Cf. *Punjab Record*, No. 47 of 1892.]

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Amritsar, dated 22nd December 1891.

The parties to this suit were Mussalman Gujars, residing, the plaintiff in the city of Amritsar, and the defendants in a village in the Lahore tahsil.

The plaintiff, who was admittedly a minor, sued through his father for custody of his wife who had been a widow.

The first Court (Munshi Muhammad Ali Khan, Munsif, 1st class), finding that Mussammat Aisha never expressed her consent to the marriage or to the execution of the deed of agreement propounded by the plaintiff, dismissed the suit.

The Divisional Judge (Mr. F. C. Channing) dismissed an appeal by the plaintiff for the following reasons—

“The first question raised for my decision involves a point which as far as I am aware is absolutely novel, viz., whether a

“plaintiff who is a mere child, can bring a suit for restitution
“of conjugal rights.

“I can trace no authority on the subject, but I am of
“opinion that he cannot. The essence, as I understand the
“matter, of such a suit is that the wife shall be compelled to
“return to the protection and society of her husband, while
“he in his turn, will afford to her the conjugal society
“and protection due to her. But in this case the plaintiff
“manifestly cannot as yet fulfil any of the duties incumbent on
“him as a husband, and where there are reciprocal rights and
“duties, it appears to me that a plaintiff who cannot fulfil his
“duties, is not entitled to demand the assistance of the Court
“to compel his wife to reside not under his protection (for he
“can afford none), but under the protection of his guardian.

“Another way in which this suit may be looked at is,
“Could the boy's father sue in his own name for a decree to
“compel the alleged wife to live with him as a daughter-
“in-law? As far as I am aware, he could not institute such a
“suit, and yet that is what this suit really amounts to.

“As I hold this view, it is not necessary for me to find as
“to whether the woman is really the wife of the plaintiff or
“not.”

The plaintiff preferred a further appeal to the Chief Court,
the judgment of which, dismissing the appeal, was delivered by

BULLOCK, J.—We have the parties before us. The plain- 23rd June 1892.
tiff Kalu is a little boy of apparently some eight years of age :
the first Court thinks him to be ten. He is at any rate a very
young boy and of a very childish appearance, and his age may
be accepted to be ten as the first Court thinks. The de-
fendant was a widow: she seems to be near upon thirty: the
lower Court considers her to be between twenty-five and thirty.
It is alleged that a marriage took place between the parties
in 1886, when the boy was about four, and the woman was
between nineteen and twenty-four, at the lowest computation,
and the plaintiff, suing through his father as next friend, prays
that an order be directed to the defendant that she return to
him. The first Court found against the fact of the marriage.
The Divisional Judge to whom an appeal was preferred dismis-
sed the claim on the ground that “the plaintiff manifestly
“cannot as yet fulfil any of the duties incumbent on him as a
“husband” and that “a plaintiff who cannot fulfil his duties
“is not entitled to demand the assistance of the Court to

“compel his wife to reside not under his protection (for he can “afford none), but under the protection of his guardian.” He dismissed the appeal without considering the question of the fact of the marriage, and an appeal is made to this Court on behalf of the plaintiff.

This Court possesses a discretion which it is constantly called upon to exercise in suits of this nature, and refuses in the exercise of that discretion to make an order for the return of a wife to her husband, where there are reasons against making such an order,—for example, the reasonable certainty that she will be subjected to cruelty. The discretion must extend to all cases of a matrimonial nature like the present suit; and we consider that, assuming the plaintiff to have become the husband of the defendant by the performance of a marriage ceremony, we should act improperly if we were to direct the defendant to live with this little boy. He is of himself unable to provide her with a suitable residence and she must be entirely under the control of some one else, though she is of full age, if directed to take up her residence with the plaintiff. We refuse to make the order prayed for and dismiss the appeal with costs.

Appeal dismissed.

No. 129.

APPELLATE SIDE. { TAJA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
GAMAN AND SALU,—(DEFENDANTS),—RESPONDENTS.
Case No. 1133 of 1890.
(BENTON & STODDON, JJ.)

Custom—Alienation—Sale without necessity to sister's sons—Gondals of tahsil Phalian, Gujrat District.

Found, that a Gondal of tahsil Phalian, Gujrat District, was not entitled by custom to make a sale of his land, without necessity, to his sister's sons in the presence of his brother's sons.

Punjab Record, No. 8 of 1891, referred to.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 5th July 1890.

The principal question for determination in this case was whether Manju, a Gondal, a resident of mauza Pindi Lala, is

the Phalian tahsil of the Gujrat District, was competent by custom to make a gift of his land to his sister's sons in the presence of his brother's sons.

A Judge sitting at Chambers directed a remand under Section 566, Civil Procedure Code, for a finding on the above issue.

The Divisional Judge (Mr. F. Bullock) made the following return—

“ Whence this issue arises I do not know : nothing of the sort was alleged in the plaint or in the plaintiffs' examination, and as the plaintiffs themselves claimed a right of pre-emption over the land, they necessarily admitted the sale to be in all respects valid to pass the title.

“ The plaintiffs' evidence is worthless, and they cannot refer to any instances decided in support of their contention. The power of sale and mortgage, subject to the usual right of pre-emption, is recorded in the *Riwaj-i-am*, and the power of gift for religious purposes to a limited extent. Taking the fact that the plaintiffs' evidence proves no incapacity ; that there is no specific prohibition in the *Riwaj-i-am* ; and that the plaintiffs' own conduct necessarily imparts the validity of the gift, I consider the gift valid.”

The judgment of the Chief Court, upon the above return being made, was delivered by

BENTON, J.—The land in dispute is situated in tahsil Phalian, Gujrat District. The plaintiffs, nephews of the deceased Manju, sue his sister's sons for possession of his estate of the extent of 11 ghumaos 4 kanals 8 marlas in succession to him. The defendants claim to hold in virtue of a deed of sale to them, the price in which is stated to be Rs. 195 expended on food and attendance. The deed was executed on the 16th August 1886 and registered when Manju was, if not in *extremis*, at any rate in a very doubtful condition as regards competency, as the registering officer describes him as *behosh*. One would suppose, however, that this officer must have regarded him as at any rate capable of understanding what he was doing, otherwise he would not have consented to register. The Divisional Judge's finding was that Manju may have been deaf or stupid, but he knew perfectly well what he was doing, otherwise the plaintiffs would not have recognised his act. Their recognition appears to have amounted to this much that they bargained, according to their own allegation, with the

20th July 1892.

defendants to take so much of the land, apparently for a proportion of the price and to forego their right of pre-emption. They alleged that they paid Rs. 65, the third of the price, in the hope of getting a third of the land and took a bond for it. They sued to recover this money and failed.

Waiving however this objection as to Manju's competency we think that the plaintiffs must succeed on the ground that there was really no consideration, and that in accordance with custom the deceased had no power to alienate without necessity or to make a gift of his land to his sister's sons in the presence of his nephews. The land appears to have been ample for deceased's support and to afford him all the attention he required.

The Divisional Judge has found that the deceased could make the gift in question, but according to his own quotation of the record of customs it is only gifts for religious purposes that are admissible. This record lays down that there is no power of mortgage or sale in order to injure relations without necessity. On the same record of custom, it was decided in *Punjab Record*, No. 8 of 1891, that there was no power to a sonless proprietor to make a valid gift of ancestral land to a nephew even in presence of a brother and nephews, and the whole subject was there very fully considered. All the more it follows that there can be no power in presence of nephews to make a valid gift to sister's sons.

We therefore accept the appeal and we decree the plaintiffs' claim to the land sued for, with costs in all the Courts.

Appeal allowed.

No. 130.

SAIN DAS,—APPELLANT,

Versus

MUSSAMMAT SAHIB DEVI,—RESPONDENT.

Case No. 1083 of 1890.

(BENTON & RIVAZ, JJ.)

APPELLATE SIDE. }

Probate and Administration Act, 1881—Universal or residuary Legatee—Grant of probate to, with copy of the will annexed, under Section 19 of the Act,

The testator, a Hindu, left a will disposing of his property as follows : two items mentioned in the list of property given in the will, to be dedi-

ated to charitable uses and all the rest of the property to go to his wife "besides whom I have no other heir to succeed to my property"; provision was then made for the maintenance of an adopted son; and, lastly, two persons were appointed by name "to act as sarbarahs for my wife."

No executor was appointed by the will.

Held, that the widow was not entitled to probate as an executrix appointed by necessary implication within the meaning of Section 7 of Act V of 1881, but to letters of administration with the will annexed, under Section 19 of the Act, as universal or residuary legatee.

Held, also, that the sarbarahs were not executors named in the will and that such was not the testator's intention.

Held, further, per Rivaz, J. The District Judge was correct in excluding from the inquiry any question relating to the capacity of the testator to dispose of his property at all by will, or as to the validity (by law or custom) of any of the provisions contained in the will.

First appeal under Section 86, Act V of 1881, from the order of W. A. Harris Esquire, District Judge, Lahore, dated 14th July 1890.

K. P. Roy, for appellant.

Rattigan, for respondent.

This was an appeal from an order made by the District Judge, Lahore, in a proceeding under the Probate and Administration Act, 1881, in connection with the will of one Surjan Singh, deceased, an Arora of the city of Lahore.

Mussammat Sahib Devi, the widow of the deceased, applied for probate. This was opposed by Sain Das, brother of the deceased, among others.

The issues fixed by the District Judge, apart from questions of fact, were—

1. If Surjan Singh duly executed the will, was the widow appointed executrix by implication; and, if so, is she entitled to probate?
2. If not entitled to probate, is the widow entitled to letters of administration with copy of the will annexed?

The District Judge found that the widow was appointed executrix by implication: his reasons were as follow—

"Reading the will by which the testator's wife was to be sole malik of all his property, save that gifted for a charit-

NOTE.—Cf. *Punjab Record*, No. 140 of 1892, being the suit of the widow against Sain Das for recovery of her husband's estate under his will.

"able purpose (details given) : that she was to be malik of the property that was under mortgage to him, and therefore by implication had the power of recovering sums due on mortgages, by suit or otherwise : that she was likewise to be the malik of Rs. 1,100 due to the testator by Sain Das, and therefore by implication had the right to sue for or otherwise recover this sum due : and seeing the detail given of the rents of the houses left to her which it was intended she should realise : and, lastly, seeing that she had been charged with paying the maintenance allowance to Salo (an adopted son) and his wife, and of providing them with a place to reside in, I cannot but come to the conclusion that the petitioner was the person intended by the testator to carry out his wishes, and therefore was the executrix intended by implication."

The District Judge accordingly made an order for a grant of probate of the will to the widow as executrix by implication.

Sain Das, the principal objector, appealed to the Chief Court under Section 86 of the Act.

The questions raised on behalf of the appellant and the decision thereon sufficiently appear from the judgment of the Court which was delivered by

28th Novr. 1892.

RIVAZ, J.—The District Judge of Lahore has, by his order dated 14th July 1890, granted probate of the will of the late Surjan Singh, who died at Lahore on the 11th May 1889, to his widow, Mussammat Sahib Devi, as executrix "by necessary implication" within the meaning of Section 7 of the Probate and Administration Act (V of 1881).

One of the objectors in the lower Court was Sain Das, brother of the deceased testator, and he has filed an appeal in this Court as permitted by Section 86 of the Act. The material objections urged by Sain Das in the lower Court were:—

- (1). That the will was not valid—
 - (a) as it was not executed by the testator while in possession of his senses ;
 - (b) because the testator had no power to make such a will.
- (2). That the petitioner, Mussammat Sahib Devi, was not an executrix appointed by the will.

The District Judge overruled all the objections, finding that there was no absence of mental capacity in the testator when he executed and registered the will, and holding that Mussammat Sahib Devi was appointed executrix by necessary implication. As to the plea challenging the validity of the will on the ground of its being opposed to Hindu law and custom, the District Judge declined to allow an issue, holding that this matter was outside the scope of the inquiry. This point is again raised by the fifth ground of the appeal to this Court, but it appears that since the order now under appeal, Mussammat Sahib Devi has brought a regular suit for possession of the property mentioned in the will, in which suit Sain Das, as sole defendant, has had every opportunity of contesting the validity of the will upon all admissible grounds. Even, therefore, if the District Judge's ruling was wrong in law, there would be no prejudice to the defendant, Sain Das ; but as the matter has been alluded to, I may record my opinion that the view taken by the District Judge is a correct one, and that he was right in excluding from the inquiry any question relating to the capacity of the testator to dispose of his property at all by will, or as to the validity (by law or custom) of any of the provisions contained in the will.

The main questions argued before us by the appellant's pleader were—

- (1) as to the mental capacity of the testator at the time of the execution of the will ;
- (2) as to the legality of the order granting probate to Mussammat Sahib Devi as executrix by implication.

As to the first point, I think that there can be but little doubt that the District Judge's finding should be upheld. Only two witnesses were tendered for examination in the lower Court, *viz.*, Faqir Jamal-ud-din, Honorary Extra Assistant Commissioner and non-official Sub-Registrar of Lahore (who went to Surjan Singh's house to register the will) called by the petitioner, and Thakur Das, one of the attesting witnesses, produced by the opposite party. I consider that the evidence of Faqir Jamal-ud-din, whose testimony is *primâ facie*, from his position and character, entitled to implicit credence, satisfactorily establishes that Surjan Singh, though very ill when he executed and registered the will, was not suffering from any mental incapacity, which would imply any absence of free consent, or of full knowledge of what he was about. Surjan

Singh was an acquaintance of the witness, and the latter is able to remember that he found Surjan Singh in the perfect possession of his senses when he attended at his house to effect registration of the will. The contents of the will were read over to the dying man, who then admitted execution thereof. Sain Das, who was present, took exception to the provisions of the will, but was overruled by the testator. The contents of the will were personally explained by the witness, and the testator then accepted them as correct. In short, the evidence of this witness is particularly strong in support of the will, and Thakur Das' evidence is, in the face thereof, most unsatisfactory and unconvincing, besides which it is open to the suspicion of being that of a partisan witness. The arguments adduced to show that the will bears internal evidence of being, either not a correct expression of the testator's own wishes, or the suggestions of a man too ill to know properly what he was doing, appeared to me to be of little force, and in no way shake the opinion which I have already expressed that the will represents the genuine wishes of the deceased, expressed at a time when he was not suffering from any mental incapacity.

As to the second point, I have come to the conclusion that, strictly speaking, probate should have been refused to the applicant, and letters of administration with the will annexed should have been granted to her as universal or residuary legatee, under Section 19 of the Probate and Administration Act. The provisions of the will may be summarised as follows: First, the testator, after the usual preliminaries, sets out a list of his various properties: next, he provides that after his death the first two items mentioned in the list shall be considered as dedicated to charitable purposes, but that all the rest of the property shall go to his wife "besides whom I have no other heir to succeed to my property": a provision is then made for the maintenance of an adopted son, Salo, to whom the widow is to make a monthly allowance and assigns a house for purposes of residence: and lastly, two gentlemen are appointed by name "to act as guardians (sarbarah) for my wife." It was contended *inter alia* that these two gentlemen were the executors named in the will, but I do not think that this can have been the testator's intention. There are no words in the will suggesting that the execution of the will was meant to be confided to the two persons named as sarbarahs, though, no doubt, they may have been intended to assist the widow in the management of her

property, she being young and probably inexperienced. It need only be added with reference to this part of the case, that the sarbarahs have not intervened up to the present time, or made any claim to prove the will.

As to the question, whether Mussammat Sahib Devi is an executrix appointed by necessary implication, I would first observe that it was obviously the intention of the Indian Legislature, in enacting Section 19 of the Probate and Administration Act, that an universal or residuary legatee *as such* should not be entitled to probate, but to letters of administration with the will annexed. I do not think that it is necessary for the purposes of the present decision to give a positive opinion as to whether the present respondent is an universal or a residuary legatee under the will, as the true question remains, in my opinion, unaffected in whichever light she be viewed. But I am inclined to hold that she is an universal rather than a residuary legatee, for practically she is declared to be the heir to all the testator's property, including, I should say, his remaining interest (if any) in that declared to be dedicated to religious purposes, subject only to a trust in favour of Salo. But I think the point is immaterial, for I can find nothing to support the contention of the respondent's counsel that the practice in England is to refuse probate to an universal legatee but to grant it to a residuary legatee *as such*. The practice in England seems to be the same as that contemplated by Section 19 of the Indian Act, *viz.*, to grant letters of administration with the will annexed to both universal and residuary legatees, claiming only in that capacity. (*I Williams on Executors*, 468, et. seq 8th edn. But the question may also arise whether the legatee named in the will, be he universal or residuary legatee, has not also been appointed executor by implication. And here I understand the test to be whether the person claiming to be constructively appointed can point to any words in the will which commit to him (though not expressly nominating him as executor) "the charge and office, or the rights "which appertain to an executor" (*I Williams on Executors*, 243, 8th edition); or, in other words, direct him "to do one or more "of the acts which are competent to and fall within the office "of the executor nominated" (*Coot's Probate Practice*, 27). In the present case, I can find no such directions in the will, and I therefore come to the conclusion that Mussammat Sahib Devi is not executrix by necessary implication within the terms of the Indian Act.

As to the Indian cases cited, those in which the will contained directions as to the administration of the estate are easily distinguishable and need not be referred to further. In *Radhika Mohan Sett* (7 B. L. R., 563), Mr. Justice Paul granted probate to an universal legatee, as executor by necessary implication, though the will contained no provisions relating to the execution of the will. But this case has not been subsequently followed in Bengal, vide *In the goods of Shashee Bhusun Bannerjee* (I. L. R., 19 Calc., 582), and the cases therein cited, where Mr. Justice Trevelyan refused probate to an universal legatee as such, and granted letters of administration with the will annexed. Again, in *Ex parte Vittal Doss* (I. L. R., 15 Mad., 360) Mr. Justice Shephard came to a similar decision, basing his opinion on the fact that in the will before him there was no direction that the legatee named "should collect the testator's estate and pay all just debts,—in other words, that he should discharge the function of executor." The learned Judge distinguished *Radhika Mohan Sett's* case upon the ground, that in the will propounded in that case there was such a direction, but I confess that I cannot follow the learned Judge here, after referring to the report in the seventh volume of the Bengal Law Reports, where the will appears to be set out *in extenso*.

The question remains as to the proper order to be passed. More than two years have now elapsed since the District Judge granted probate of her deceased husband's will to Mussammat Sahib Devi. During that interval Mussammat Sahib Devi has had to bring a suit against Sain Das for the whole of the property. She has succeeded in the lower Court, save as to certain cash items not proved to be recoverable

Published as *Punjah Record*, No. 140 of 1892.

from Sain Das, and we have to-day dismissed an appeal from the lower Court's order b Sain Das, and thus upheld the will itself in all its essential provisions. The defect which I believe to exist in the lower Court's order in the case under appeal is, so far as the present parties are concerned, and indeed so far as any one named in the will is concerned, almost immaterial. So far as I can see, if the lower Court had, instead of allowing probate, granted letters of administration with the will annexed, the only practical distinction would have been that the Judge would have been bound to take an Administration Bond under Section 78 of the Act. As pointed out by *Williams* (Vol. I 468) "The office of an administrator with the

"will annexed differs little from that of an executor; and it is plain that the will to which it is annexed must be similarly proved, as though probate were taken of it by an executor;" and this is exactly what Section 19 of the Indian Act contemplates. Considering then that the will entitles the present respondent to the whole of the deceased's property; that Salo, who is named as adopted son in the will, has never challenged its provisions; and further that it seems that a Bond, even if now taken, would in no way enure for his benefit, the payment of his maintenance being a matter of trust rather than of administration, I do not think that it is at the present stage of the proceedings necessary to formally vary the District Judge's order.

In my opinion, it will be sufficient to direct that this appeal be dismissed with costs.

BENTON, J.—I concur.

Appeal dismissed.

No. 131.

BODI AND KALU,—(DEFENDANTS),—APPELLANTS,

Versus

MUSSAMMAT MAHTAB BIBI,—(PLAINTIFF),— } RESPON-
ILAHIA AND MAHIA,—(DEFENDANTS),— } DENTS.

} APPELLATE SIDE.

Case No. 1228 of 1891.

(BENTON & RIVAZ, JJ.)

Punjab Laws Act, 1872—Pre-emption—Bhai nazdiki—Co-sharers in joint undivided immoveable property.

Held, that the widow of a deceased collateral did not fall within the category of "bhai nazdiki," who, under the terms of the *Wajib-ul-ars*, were entitled to pre-emption,—*cf. Punjab Record*, No. 196 of 1889.

Held, also, that the land in suit was not joint undivided immoveable property within the meaning of Section 12 (a), *Punjab Laws Act, 1872*: the land had been divided so far as it was possible to divide it.

That the property was a portion of what once formed a joint estate, conferred no prior right of pre-emption.

*Further appeal from the decree of E. W. Parker Esquire,
Divisional Judge, Lahore, dated 7th July 1891.*

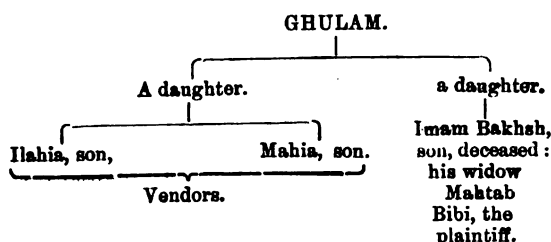
Grey, for appellants.

Fazldin, for respondents.

This was a suit for pre-emption of land in a village in the Lahore District. The plaintiff's allegations were that on the 26th May 1890, the defendants 1 and 2 sold the land in suit to defendants 3 and 4 for Rs. 200-0-0: that the consideration entered in the deed of sale (Rs. 400-0-0) was fictitious: and that she (the plaintiff) had a superior right of pre-emption to that of defendants 3 and 4, the vendors being closely related to her husband.

The defendants 3 and 4 pleaded, *inter alia*, that the plaintiff had no right of pre-emption, either by law or custom.

The parties were related thus:



The first Court (Lala Ram Nath, Extra Assistant Commissioner), decreed the plaintiff's claim. He said: "The village *Wajib-ul-arz* shows that the brother is first entitled to pre-emption; then the nazdiki; and then the village proprietors. The question therefore is, whether the plaintiff is a nazdiki of the vendors. Nazdiki and karabati are one and the same thing. *Punjab Record*, No. 179 of 1889, defines karabati as meaning not only a male collateral, but a 'near male collateral:' thus a widow, such as the plaintiff, cannot come under the category of karabati." He then decided that the plaintiff had a superior right as a co-sharer.

The defendants, purchasers, appealed to the Divisional Judge (Mr. E. W. Parker) who dismissed their appeal under Section 551, Civil Procedure Code, without serving notice on the respondent. His reasons were as follow: "It seems to me that this appeal must fail on the face of it. It is not denied that both parties are representatives of the estate of Ghulam which descended through his two daughters to Ilahi Bakhsh and Mahia of the one part, and the plaintiff's husband of the other. The plaintiff holds her husband's estate, and in right of that land she certainly has a right of pre-emption under Section 12, Act IV of 1872. She is a relation (through her husband, whose estate she holds) of the defendants. The fact

“that Ghulam’s estate was inherited by his daughters does not affect the case. The parties are related through those who took the estate from Ghulam.

“The plaintiff’s land forms an integral part of what formed one estate in the time of Ghulam and she is thus, on grounds of relationship, and by the nature of the estate she holds, entitled to claim pre-emption. The purchasers are not in a better position than she is. They are said to be land-holders in the village.

“The right of pre-emption in cultivated land is regulated by express law and not by the *Wajib-ul-arz* or its contents. The law gives a prior right to relations and co-sharers. Even if Ghulam’s estate has now been divided, the plaintiff’s position as a near relation and owner of part of what was originally the same estate gives her a preferential right. I thus go further than the lower Court did, and consider the decree in favour of plaintiff must be upheld.”

The Divisional Judge also refused a certificate under Section 40, sub-section (1) (a), Punjab Courts Act.

The purchasers then applied for revision under Section 40, sub-section (2) of the Courts Act, and the application was admitted by Mr. Justice Stogdon to be dealt with as a further appeal.

The judgment of the Chief Court accepting the appeal and dismissing the plaintiff’s suit was delivered by

BENTON, J.—The plaintiff, who is the widow of a cousin of the vendors, both her husband and his cousins having been the sons of sisters, sued for pre-emption, basing her claim on her relationship, and possibly also on the alleged joint character of the property. The claim as regards relationship was founded on the *Wajib-ul-arz*. According to it, any proprietor wishing to sell must first offer to his full brother (bhai hakiki), then to his near collateral (bhai nazdiki) and failing these to some proprietor in the village. The plaintiff claimed that she was included in the bhai nazdiki. The land consists of some 30 kanals of agricultural land held separately, and of a fourth share in a well with paths attached to it, of the extent of 14 marlas, which is used for irrigating the agricultural land sold, and other lands, including land held by the plaintiff under a widow’s tenure.

Both Courts disallowed the claim as based on the widow being a bhai nazdiki; but the first Court held that the widow was still a co-sharer and so had a superior right of pre-emp-

3rd Decr. 1892.

tion. The Divisional Judge held that the plaintiff as a near relation and owner of what was originally the same estate, had a preferential claim, not under the *Wajib-ul-arz* but under the general law. The rule of law intended is not quoted, but probably Act IV of 1872, Section 12 (a), is meant.

We are agreed that, for the purposes of pre-emption, the plaintiff cannot be held as included in the terms "bhai nazdiki" of the *Wajib-ul-arz*. A similar conclusion was come to with reference to the term karabati for the purpose of succession, in *Punjab Record* No. 196 of 1889, and bhai nazdiki may well be regarded as its equivalent. If it had been intended to give the widows of deceased collaterals a right to claim pre-emption, it would have been necessary to mention them specially.

As regards the property being joint undivided immoveable property, we cannot admit it. It is obvious that the land has been divided, so far as it is possible to divide it, and that the joint portion is a mere appendage of that held separately which cannot be separated from it. That the property is a portion of property which once formed a joint estate is true, but according to the law this gives no precedence.

We therefore accept the appeal, and dismiss the plaintiff's claim with costs in all the Courts.

Appeal allowed.

No. 132.

GANDA RAM,—PLAINTIFF,

Versus

SAIN AND OTHERS,—DEFENDANTS.

Case No. 13 of 1892.

(PLOWDEN & ROE, JJ.)

REFERENCE SIDE. {

Court Fees Act, 1870, Section 29—Amendment of document—Fresh suit.

The plaintiff sued in a Revenue Court for (1) value of produce, and (2) value of trees.

The Revenue Court decided the suit as regards the produce, referring the plaintiff to the Civil Courts as regards the value of the trees.

The plaintiff sued in the Civil Courts accordingly, filing his plaint on unstamped paper.

Held, that Section 29, Court Fees Act, 1870,* did not operate to exempt the second plaint from payment of the usual Court fees.

* Section 29.—Where any such document is amended in order merely to correct a mistake and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

Case referred under Section 617, Civil Procedure Code, by Diwan Ram Nath, District Judge, Hoshiarpur.

This was a reference made by the District Judge, Hoshiarpur, under the provisions of Section 617, Civil Procedure Code.

The plaintiff had filed a suit against the same defendants as in the present case for recovery of Rs. 301-3-11, as follows :—

Value of produce	...	...	...	227	1	3
Value of trees cut	...	...	...	74	2	8
<hr/>						
	Rs.	...	...	301	3	11

The suit was treated as cognizable by a Revenue Court and was sent to the Court of the Tahsildar, Hoshiarpur (Assistant Collector, 2nd grade), for disposal. The Tahsildar held that the claim for produce was alone cognizable by a Revenue Court and referred the plaintiff, as regards the value of the trees claimed, to the Civil Courts.

The plaintiff thereupon filed a suit in the Civil Courts, upon plain paper, to recover the Rs. 74-2-8 on account of the trees. The Munsiff returned the plaint to be stamped in accordance with law. The plaintiff appealed against this order to the District Judge insisting that, as he had already paid the prescribed Court fee, he could not be required to pay it a second time, and relying upon Section 29, Court Fees Act.

The District Judge referred the point to the Chief Court under Section 617, Civil Procedure Code, expressing an opinion against the plaintiff's contention.

The judgment of the Chief Court was delivered by

Roe, J.—The case stated is that the plaintiff sued first in the Revenue Court for (1) value of produce, (2) value of trees cut. The Court considered the latter part of the claim beyond the cognizance of a Revenue Court, and proceeded to hear the suit on the first part only, referring the plaintiff to the Civil Court for the second part. 19th Novr. 1892.

Plaintiff has now sued in the Civil Court, but has refused to stamp his plaint, claiming that his case falls under Section 29 of the Court Fees Act. His plaint has been rejected in consequence of his refusal to stamp it, and on his appeal the

District Judge refers the question whether the plaintiff can claim exemption from stamp under Section 29.

Section 29 provides that when any such document (i.e., any document required under the Act to be stamped) is amended merely to correct a mistake or to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

It is perfectly clear that this section does not apply to the plaint in the present suit, since there has been no amendment of a document at all. The plaint filed in the Civil Court was an entirely fresh document and required the usual stamp.

Whether the plaintiff can claim any refund on account of the stamp on his plaint in the Revenue Court is a matter with which we are not now concerned.

Reference returned.

No. 133.

APPELLATE SIDE. {

RAMZAN SHAH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT SHAH BEGAM AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

Case No. 380 of 1891.

(BENTON & RIVAZ, JJ.)

Custom—Alienation—Childless proprietor—Sayads of town of Gujrat owning land in adjacent villages.

Found in a suit, the parties to which were Sayads of the town of Gujrat, owning land in the villages attached thereto, that no custom was established by the defendants—upon whom the onus lay—permitting the alienation of ancestral immoveable property save for necessity.

Further appeal from the decree of F. Bullock Esquire, Divisional Judge, Jhelum, dated 4th February 1891.

Lajpat Rai, for appellants.

Sangam Lal, for respondents.

The plaintiffs, in the suit out of which this appeal arises, were collaterals in the sixth degree of the defendant Ramzan Shah, a sonless proprietor, and sued for a declaratory decree that a sale made by him would, not affect their reversionary

interests. The property sold was eventually held to be ancestral, and consisted of land in two villages attached to the town, and a house in the town of Gujrat.

The parties were Sayads of the town of Gujrat owning land in villages attached to the town.

Two questions arose for determination in the appeal—

1. Whether the property in suit should be regarded as ancestral ;
2. Whether, in any case, the defendant Ramzan Shah had the power to alienate it without necessity.

The Chief Court, considering that these questions had been unsatisfactorily disposed of, remanded the appeal under Section 566, Civil Procedure Code.

The order of remand was delivered as follows—

BENTON, J.—The plaintiffs and the defendant Ramzan Shah, who are Sayads of the town of Gujrat, owning land in the villages attached to it, succeeded to the estate of a collateral named Mehr Shah, who died childless. Ramzan Shah also is childless and he has alienated the land he inherited, which is situated in two of those villages named Nanwa Nurpur and Nanwa Nazul, Gujrat, and also his share in a house in the town of Gujrat, to the second defendant. It is alleged that there was no necessity for these alienations and the plaintiffs sue to have it declared that they shall not affect their reversionary rights. 21st May 1892.

Two questions have to be decided on appeal, *viz.*,

1. Whether the property in suit should be regarded as ancestral ?
2. Whether, in any case, the defendant Ramzan Shah had the power to alienate it without necessity.

The first Court held, for reasons apparently satisfactory, that only the property in mauza Nanwa Nurpur was ancestral, and that the share of the house and the land in Nanwa Nazul, Gujrat, were not ancestral.

The plaintiffs are related to Ramzan Shah, we find according to the pedigree, in the sixth degree. The first Court held that they were related in the fifth degree, and that in their presence Ramzan Shah, defendant, was not competent to alienate the property found to be ancestral. Not finding any necessity established, it decreed the plaintiffs' claim in part.

The Divisional Judge found that all the property was ancestral inasmuch as it had descended to Ramzan Shah, defendant, from an ancestor, Mihan Shah, but while concurring in the finding that there was no necessity, he found that, in accordance with the *Riwaj-i-am* and the evidence, there was an unrestricted power of alienation, and he dismissed the plaintiffs' suit. The plaintiffs appealed and there were also cross-objections by the defendants which were thus allowed.

The case has been unsatisfactorily disposed of as regards both the questions which have to be decided on this appeal. The Divisional Judge has made the mistake of supposing that Mihan Shah was an ancestor of Ramzan's instead of being a collateral. Besides, there has been no inquiry as to custom and no copy of the *Riwaj-i-am* has been filed, although we apprehend we know its tenor from the Settlement Report of the district.

We have grave doubts as to whether the *Riwaj-i-am* permitting unrestricted alienation gives the correct custom. It is not contended that the family of the parties is on a different footing as regards custom from other agriculturists in the district. The *Riwaj-i-am* appears to lay down that alienation is subject to the right of pre-emption, but there is also a provision to the effect that it cannot be permitted in order to spite a son or a brother. This latter provision suggests that there are very probably other restrictions, and that in fact the ordinary rule by which alienation is usually restricted may prevail. It is admitted that only one instance of alienation having been made in the presence of collaterals in the family, can be cited, although the Divisional Judge says that the power of alienation is strongly supported by the evidence.

Having pointed out the Divisional Judge's error with regard to the relationship of Mihan Shah, we remand the case to him and request that he favour us with a fresh finding as regards the property, whether ancestral or otherwise.

We also request that a copy of the *Riwaj-i-am* be put on the file and that a searching inquiry be made, supported by instances so far as possible, in order to determine what power of alienation a childless proprietor has in regard to the land in question, whether it is in accordance with the ordinary rule forbidding it or at variance with it.

The remand is made under Section 566 of the Civil Procedure Code and the return should be made in three months.

Upon receipt of a return to the above order of remand, the judgment of the Court was delivered as follows by

RIVAZ, J.—The inquiry which has now been made in 21st Novr. 1892. accordance with this Court's order of the 21st May 1892, establishes, we think satisfactorily, that the whole of the land in suit is ancestral property, and this is now the view of both the lower Courts. There is documentary evidence which strongly suggests that the property was in the family at or even before the time of Mir Abdul Wahab, the common ancestor of the parties, and there is good reason to believe that he himself was buried within the disputed area. The settlement records point to the land in Nanwa Nurpur having been acquired by Mir Abdulla, who was Mir Abdul Wahab's grandfather, and there is some evidence which connects the acquisition of the land in Nanwa Nazul, Gujrat, with the same ancestor.

As to the house in dispute, there is no evidence that this ever belonged to Mir Abdul Wahab, or is to be regarded as ancestral property, and the presumption lies in the opposite direction.

As to the custom, we consider that the onus lies upon the defendants to justify the validity of the alienation, so far as it affects the ancestral land. We consider, as previously intimated, that the provision in the *Rivaj-i-am*, read as a whole, does not strongly support the view that an unrestricted power of alienation exists in the parties' family, and there is no other convincing evidence forthcoming. There appears to be no good reason then why the present parties should not be held to be bound by the custom ordinarily prevalent among agriculturists, which does not allow of the alienation of ancestral property save for necessity.

We accept this appeal and grant the plaintiffs a decree declaring that the sale of all the lands mentioned in the deeds of the 18th November 1889, situated both in Nanwa Nurpur and Nanwa Nazul, Gujrat, will not affect their reversionary interests after the death of the vendor, Ramzan Shah. We make no declaration as to the house.

Plaintiffs will receive their full costs in all the Courts.

Appeal allowed.

No. 134.

HUKM SINGH & OTHERS,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE. }

Versus

SOCHET SINGH,—(DEFENDANT),—RESPONDENT.

Case No. 439 of 1891.

(PLOWDEN & FRIZELLE, JJ.)

Custom—Succession—Pagwand and Chundawand—Randhawa Jats of tahsil Ajnala, Amritsar District.

Found in a suit the parties to which were Hindu Randhawa Jats of the village of Chamiani in the Ajnala tahsil of the Amritsar District, that by the existing custom of such Jats in this village, the chundawand and not the pagwand rule of distribution applied to the deceased father's land.

Remarks on the custom in the Amritsar District being in a state of transformation from chundawand to pagwand.

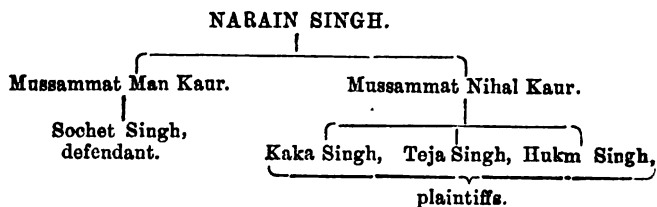
Further appeal from the decrees of Colonel C. H. T. Marshall, Additional Divisional Judge, Amritsar, dated 7th January 1891.

Lewin, for appellants.

Lal Chand, for respondent.

This case arose out of a dispute as to the succession to the land—1,496 kanals 7 marlas—of Narain Singh of mauza Chamiani in the Ajnala tahsil of the Amritsar District.

Narain Singh left him surviving four sons by two wives, thus—



The parties were Randhawa Jats; and the plaintiffs claimed that the land should be divided according to the pagwand system, the defendant contending that the chundawand rule was the one governing the parties.

The first Court (Pandit Hari Kishen, Subordinate Judge) decided that the parties were governed by the pagwand rule, and decreed in the plaintiffs' favour accordingly. His reasons were recorded thus—

“As regards the chundawand custom among Randhawa Jats, the defendant produced more than half a dozen

“witnesses to depose in his favour, but they cannot give any satisfactory instances by which the custom of chundawand can be held to have been fully established in their tribe: on the other hand, the plaintiffs’ two witnesses show that the custom of pagwand obtained in the tribe of Randhawa Jats.

“The defendant places much stress on the entry made in the Settlement pedigree table and *Riwaj-i-am*. The former shows simply that the past and future division of inheritance among Jats of the village of Chamari was and is made by chundawand, and the latter sets forth that the division will be made by chundawand. In the margin of this *Riwaj*, some instances are detailed according to various parganas or tahsils: these instances show that chundawand was held to obtain in some cases in tahsils Amritsar and Taran Tarn, and that pagwand was followed in certain cases in parganas Ajnala and Tarn Taran (the parties belong to pargana Ajnala), and a note is affixed therein as follows:—

“*Harchand ke taqsim sabik chundawand siada pai jati hai, magar anda ko riwaj pagwand ka malikan ne mustasna karar deya aur baz dehat men woh aml qaim bhi hai, viz.:*—that though there appear to be more cases of division by chundawand in former days, yet the owners in exceptional cases have agreed to be governed by pagwand custom for the future, and in some villages the pagwand rule has already been established (page 177 of the printed *Riwaj-i-am*).

“Now this entry, coupled with the contents of Narain Singh’s will, satisfies me that the custom of chundawand is not adopted in general by the Jats of the Randhawa tribe or by the family of the parties.

“The plaintiffs have produced copy of a judgment of Mr. J. W. Smyth, passed as Additional Commissioner, Amritsar, dated 7th May 1877, in *Hari Singh v. Hukm Singh* of the Randhawa tribe, in which the custom is fully discussed in lengthy detail, with the result that the custom of pagwand was found to obtain among the Randhawa Jats of the district.”

The Additional Divisional Judge (Colonel C. H. T. Marshall) accepted an appeal preferred by the defendant and dismissed the plaintiffs’ suit. He recorded:

“As regards the particular village of Chamari, there is an entry in the settlement papers showing clearly that the Jats of this village follow chandawand.

* * * * *

"As the settlement shows chundawand to be the custom of Randhawa Jats in mauza Chamiari, the onus fell on the plaintiffs to prove any contrary custom, and this onus they do not appear to have discharged. The defendant, on the contrary, has given specific cases of chundawand prevailing. He has also shown that, in three cases of dakhil kharij on inheritance, that custom has been followed and accepted: these were Randhawa Jats.

"Further, it appears that in November 1889, the Settlement Officer divided the parties father's jagir by chundawand and there has been no appeal.

"Taken altogether, I think it has been shown that chundawand and not pagwand is the custom among the parties, and that the plaintiffs have failed to prove that they are bound by the pagwand custom. This being the case, their suit fails."

The plaintiffs preferred a further appeal to the Chief Court. The judgment of the Court holding that it was proved upon the evidence that the existing custom of the Randhawa Jats in the village was chundawand, was delivered by

7th Novr. 1892.

PLOWDEN, J.—Narain Singh, deceased, was a Randhawa Jat of mauza Chamiari in the Ajnala tahsil. He left three sons by one wife, who are plaintiffs in this suit, and one son by another, who is defendant.

The plaintiffs seek a declaration that the custom of inheritance applicable to the estate of Narain Singh is pagwand, and the defendant in answer alleges that it is chundawand.

The first Court decreed for plaintiffs; the Court of appeal dismissed their suit; and they now appeal to this Court.

The first Court framed an issue: "Whether the custom applicable to the parties was chundawand,—onus on defendant." So far as this issue goes, it is correct. It would have been better to frame the issue: "Whether the custom was pagwand (onus on plaintiffs) or chundawand (onus on defendant)," but both parties produced evidence, and we see no reason to believe that the plaintiffs have been prejudiced or misled by the incompleteness of the issue.

There is a respectable mass of evidence to support the decision that chundawand is the custom applicable.

According to the *Riwaj-i-am* of 1861 for this district, chundawand was then the prevailing custom of Randhawa Jats, in all the parganahs where they were found. By way

of exception, the maliks of seven villages in the Tarn Taran parganah and two villages in the Raya parganah (now part of the Sialkot District) declared that they would in future abide by the pagwand rule of distribution. Not only is Chamiani, the village of the parties, not among the seven villages specified, but the administration paper of this village shows clearly that in 1865 chundawand was the existing custom. There are many examples of chundawand having been a common custom at that period among Sikh Jats in this part of the country, see No. 1160 of 1877 (Amritsar), No. 63, *Punjab Record* of 1885 (Gurdaspur and Lahore), No. 48, *Punjab Record* of 1886 (Amritsar), No. 101, *Punjab Record* of 1879 (Ferozepore), (cf. page 3, Mr. Francis' Customary Law of Moga and other tahsils.)

The plaintiffs rely chiefly upon the judgment of Mr. Smyth, as Additional Commissioner of Amritsar, in the case of *Sardar Hari Singh v. Sardar Hukm Singh*, which was appealed up to this Court (No. 1056 of 1877). That was a case of Hindu Randhawa Jats in mauza Talwandi of the Batala tahsil, and it was held that, upon the evidence there given, pagwand was proved to be the ordinary rule of inheritance among the Randhawa Jats, and not chundawand. That case cannot, however, be regarded as conclusive upon the custom of Randhawa Jats everywhere. The *Riwaj-i-am* of the Gurdaspur District for 1865 shows that in the two tahsils where Randhawa Jats were to be found, viz., Batala and Shakargarh, they declared that the prevailing custom was chundawand among Hindus, and pagwand among Muham. madans in Batala.

It seems most probable that the custom has been for some years undergoing a process of transformation, the chundawand rule gradually giving way to the pagwand. The process had commenced in parts of the Amritsar District in 1865, as the *Riwaj-i-am* testifies, and it may also have begun in the Gurdaspur District. An instance of a similar transformation at about the same period in a Lahore village, came before this Court in No. 32, *Punjab Record* of 1891.

In particular localities the process has possibly become complete, and pagwand been effectually substituted for chundawand, if the old custom has been entirely abrogated and replaced by the new one. It was open to the plaintiffs to show that this had occurred in Chamiani, but so far is this from

being proved that there are recent instances of the old rule being observed in this village, and the rule has admittedly been followed in the division of the family jagir of the parties, against the plaintiffs' desire, no doubt, but without their appealing against the order.

Upon the evidence, we think it is proved that the existing custom of Randhawa Jats in this village is chundawand.

Then it is said that the father of the parties desired to have the property distributed according to pagwand, and made a writing to that effect. But presumably he was not competent to direct a future distribution of the property at variance with the ordinary rule of inheritance. Had he actually distributed the property in his lifetime according to the pagwand rule, the position of the plaintiffs would have been a stronger one, especially if that distribution had been acquiesced in by the defendant. But this mere desire of the father cannot alter the rule of distribution to be applied after his death.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 135.

APPELLATE SIDE. {

CHANDU LAL,—(PLAINTIFF),—APPELLANT,

Versus

ANANT RAM AND BASANT RAM,—(DEFENDANTS),—
RESPONDENTS.

Case No. 598 of 1891.

(BENTON & RIVAZ, JJ.)

Indian Limitation Act, 1877, Article 44, Schedule II—Guardian and ward—Suit by minor on attaining majority to set aside a sale by person purporting to act as guardian.

Article 44, Schedule II, Limitation Act, 1877, held inapplicable to a suit by a minor after attaining his majority for possession of immoveable property conveyed away during his minority by a person purporting to act as his guardian, where it appeared that such person was not really the minor's guardian, in fact or in law.

Further appeal from the decree of G. Leslie Smith Esquire, Divisional Judge, Umballa, dated 12th February 1891.

P. C. Chatterji, for appellant.

Madan Gopal, for respondents.

The plaintiff in this case sued for possession of half a house situate in the town of Ludhiana. The plaintiff's case was that half the house belonged to him and the other half to Nandu: that the house belonged to his father, Radha, who died in 1869 leaving two minor sons, Nandu and himself, the plaintiff: and that on 9th February 1891 the whole house was sold to Sunder Das (father of the defendants, since deceased) by Nandu on his own behalf and by one Hamir Chand purporting to act as guardian of Chandu Lal (the plaintiff) who was then a minor.

The plaintiff being now of full age claimed his half share of the house, contending that the sale by Hamir Chand was not binding on him.

The only plea, material to this report, raised in the first Court was that the sale of 9th February 1891 was binding on the plaintiff.

The first Court (Syad Dilawar Ali Shah, Extra Assistant Commissioner) found that the sale was not binding on the plaintiff; that there was no necessity for the sale; that the plaintiff's father was a well-to-do person; and that even now there was property left by him in existence.

The question of limitation was first raised before the Divisional Judge, who remanded the case under Section 566, Civil Procedure Code, for a finding as to the plaintiff's age when he instituted the suit (August 1889).

The finding of the first Court was that the plaintiff was twenty years of age at the time of the institution of the suit.

The Divisional Judge (Mr. G. Leslie Smith) held that the plaintiff's suit was barred by limitation and also failed on the merits. His reasons were as follows—

“The first question is whether the suit is barred under Article 44, Schedule II of the Limitation Act. I find that it is, because I consider it sufficiently proved that the plaintiff attained his majority in 1885 and therefore brought this suit more than three years after attaining majority, viz.: in August 1889. I consider it proved that he was born in 1867 (hence attained majority in 1885) because of the entry made by the Tahsildar in the *fautinama* of the plaintiff's father, prepared in 1869, to the effect that he left a son (the plaintiff) aged two and a half years. This was made of course long before there was any dispute and must carry the greatest weight

“and in fact can leave no doubt of its truth except on the
 “ground of a possible clerical error, which is not likely. Against
 “such an entry the oral evidence of the defendants’ witnesses
 “(such as the dhai, &c.,) can carry no weight at all, the only
 “evidence of defendants that is of any use being that of Mula
 “who says he made an entry of the birth in his calendar, but
 “full reliance cannot be placed on that.

“Even if the point is not fully established and the evidence
 “be considered evenly balanced, I should nevertheless be dis-
 “posed to decide the case against the plaintiff for the following
 “reasons :—

- (1). It is for him to give distinctly the best evidence,
 “not only because he is the plaintiff, but also be-
 “cause he seeks to upset a long standing aliena-
 “tion on the strength of which, too, much money
 “has been spent by the defendants; and even if
 “the plaintiff’s version of his age be correct, he
 “kept silent for at least two years after attaining
 “majority;
- “(2). there is good reason to suppose that Hamir
 “Chand, though not his guardian *de jure*, was so
 “*de facto* and his action should therefore be up-
 “held, especially as;
- “(3). the alienation may be inferred to have been for the
 “minor’s benefit, as
 - “(a). Nandu, plaintiff’s brother, who was of
 “full age, joined in it;
 - “(b). the plaintiff’s mother, his *de jure* guar-
 “dian, is still alive, made no objection
 “at the time or since, and allowed
 “defendants to build.”

For these reasons, the Divisional Judge held that the plaintiff’s suit failed: he accordingly reversed the lower Court’s decree and dismissed the plaintiff’s suit with the usual order as to costs.

The Divisional Judge further refused an application for a certificate under Section 40, sub-section (1) (d), Punjab Courts Act, that the case was of sufficient importance to justify a further appeal.

The plaintiff then applied for revision under Section 40, sub-section (2) of the Courts Act, and a Judge sitting at Cham-

bers made an order that the application should be dealt with as a further appeal.

The appeal came on for hearing before Benton and Rivaz, JJ., the judgment of the Court being delivered by

RIVAZ, J.—We cannot agree with the Divisional Judge that this suit is barred by limitation by reason of the provision in Article 44 of the second Schedule of the Limitation Act. 8th Novr. 1892.

The plaintiff sues for possession of half a house, which belonged to his father Radha, who died in 1869, leaving two minor sons, Nandu and the plaintiff Chandu Lal. On the 9th February 1881 the whole house was sold to one Sundar Das for Rs. 600, under a deed purporting to be executed by Nandu (who had just attained his majority) on his own behalf and by one Hamir Chand, as guardian of Chandu Lal, who was still a minor. Sundar Das appears to have re-built the house at some considerable cost, and then to have died. Chandu Lal, being now of full age, claims his half share of the house, which he alleges Hamir Chand had no power to dispose of on his behalf, the transaction being one from which he derived no benefit, and Hamir Chand not being his guardian either *de jure* or *de facto*. The suit was filed in August 1889, the defendants being the sons of the deceased, Sundar Das. Limitation was not pleaded in the first Court, which, after an investigation on the merits, decreed the claim, finding that the sale of the house was, so far as plaintiff was concerned, neither for necessity nor for his benefit, and that Hamir Chand was not proved to have been plaintiff's guardian or competent to act for him. Defendant appealed to the Divisional Judge, but again no plea of limitation was raised in the written grounds of appeal. The Divisional Judge, however, noted that the question was raised at the hearing, and he therefore remanded the case for an inquiry as to plaintiff's age at the date of the institution of the suit. The return was to the effect that plaintiff was under twenty-one at the date of suit, but the Divisional Judge differed from this finding, and considering that the suit had not been filed within three years of the date when plaintiff attained his majority, held it to be barred under Article 44 of the second Schedule of the Limitation Act, assuming, without any discussion of the matter, that Hamir Chand was plaintiff's guardian when he purported to act for him at the time of the sale. The Divisional Judge also suggested other reasons for dismissing the suit upon the merits, if his view on the question of limitation was found to be incorrect.

The main ground urged on appeal by the plaintiff's pleader is, that Article 44 of the second Schedule of the Limitation Act can have no application to the present case inasmuch as Hamir Chand, who purported to act as plaintiff's guardian in the transaction now impeached, had no claim whatever to appear in that capacity, being neither his guardian *de jure* nor *de facto*. After considering the evidence upon this part of the case, we think that the above contention must prevail. It is not denied that Hamir Chand was certainly not the plaintiff's legal guardian. It is also admitted that in 1881 the natural guardians of the minor were his mother and his elder brother, Nandu, and that Hamir Chand was plaintiff's father's sister's son. There is some evidence to show that Hamir Chand lived in this very house with Radha's widow and his two sons and he appears to have been of some service to the widow in managing her affairs. It was, however, to the widow and not to Hamir Chand, that a certificate for the collection of the debts due to Radha was granted on the latter's death. It also appears from the *fautinama*, prepared on that occasion, that Hamir Chand is named as Nandu's surbarah in the matter of the lambardarship to which he succeeded on his father's death. There is, however, nothing further to indicate how or when Hamir Chand became Chandu Lal's guardian, nor is there any evidence that he managed all the family's affairs in any such capacity. The recital in the deed of sale goes for very little, especially as there is some reason to believe that Sunder Das, in his anxiety to acquire this property, succeeded in winning over Hamir Chand to assist him in the matter. We are therefore of opinion that, whatever may be the exact scope of Article 44, it certainly does not apply to the present case, where the sale is by a person who is not really the minor's guardian, either in fact or in law, and it is therefore unnecessary to discuss the question as to the exact age of plaintiff when the suit was instituted. It was not argued that the suit was barred under any other Article of the Limitation Act, and, viewed as a claim for possession of immoveable property, it is well within time, under Article 142 of the second Schedule.

On the merits, we consider that the first Court's decree is right. There is absolutely no reliable evidence to show that plaintiff derived the least benefit out of the transaction, nor has any serious attempt been made to prove that any part of the purchase money was paid to him or for his use. The

deed itself does not even recite any necessity for the sale, and the evidence shows that Radha was possessed of a considerable property, and left his widow and his sons well off. Nor do we consider that the decree for possession of plaintiff's moiety of the house should be made conditional upon his recouping the defendants the half of the amount expended by them upon improving the property. As already intimated, we have grave doubts as to the *bonâ fides* of the purchaser, the defendant's father, in the matter of the sale of the minor's interests. And as he chose to accept a title from an altogether unauthorized guardian, and then immediately expend money upon his purchase, we think that he, or rather his representatives, must bear the loss occasioned by the assertion of the minor, after attaining majority, of his lawful rights, rather than that the plaintiff's chance of regaining his property should be imperilled by any onerous condition being attached to the decree.

We accept the appeal, and restore the first Court's decree with all subsequent costs.

Appeal allowed.

No. 136.

ABDUL SAMAD,—(DEFENDANT),—APPELLANT,

Versus

RAJA SIR INDAR KISHOR SINGH, K. C. I. E.,—

(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 793 of 1891.

(BENTON & RIVAZ, JJ.)

Civil Procedure Code, Section 549—Security for costs—Recovery of costs from surety in execution or by separate suit—Liability of surety if decree against principal debtor is barred by limitation.

A. J. was plaintiff-appellant in an appeal pending in the High Court at Allahabad and was required under Section 549, Civil Procedure Code, to give security for the costs of the appeal. Pursuant to that order A. J. tendered a security bond, dated 8th September 1881, by which A. S. (defendant in the present suit) agreed to be responsible to the extent of Rs. 1,400, hypothecating a haveli situate at Sujampur in the Gurdaspur District to secure the said sum.

On 5th April 1882, A. J.'s appeal to the High Court was dismissed with costs; and on 23rd June 1890 the defendant-respondent in that appeal filed a suit against A. S. for recovery of Rs. 1,400 on the instrument of

8th September 1881, execution of the High Court decree for costs against A. J., the principal debtor having meanwhile become barred by limitation.

Held, following *Punjab Record*, No. 109 of 1886, that at the date of the High Court decree the plaintiff had no remedy against the defendant (the surety) except by regular suit, and such remedy was not impaired by the fact, that in 1888 the Legislature altered the law by providing a remedy by way of execution, which, but for the law of limitation, would have been available to the plaintiff after Act VII of 1888 became law, the rule that pending proceedings are generally governed by any change in the law of procedure not being extensible to substantive rights.

Held, also, that A. S. was not discharged from liability by reason that the right of the plaintiff in the present suit to execute the decree for costs against A. J. was barred by limitation.

Further appeal from the decree of F. C. Channing Esquire, Divisional Judge, Amritsar, dated 30th March 1891.

P. C. Chatterjee, for appellant.

Madan Gopal, for respondent.

This was a suit instituted in the Court of the Subordinate Judge of Gurdaspur (Sayad Muhammad Latif) for the recovery of Rs. 1,400. The plaintiff was the Raja of the Batia State, and his cause of action was stated as follows: That in an appeal pending in the High Court, North-West Provinces, in which one Abdulla Ju, a Kashmiri of Pathankot, was plaintiff-appellant and the Raja's father defendant-respondent, Abdul Samad, defendant 1, had executed and registered an instrument, dated 8th September 1881, by which he became responsible for the costs decreed against the said Abdul Ju to the extent of Rs. 1,400 and hypothecating a haveli situate at Sujanpur in the Gurdaspur District to secure the above sum.

Abdulla Ju's appeal to the High Court, North-West Provinces, was finally dismissed with costs on the 5th April 1882, and the Raja's son and successor instituted the present suit on the 23rd June 1890, claiming Rs. 1,400 on the hypothecation deed of 8th September 1881.

Abdul Samad having assigned the haveli at Sujanpur to one Ram Rattan, the latter was joined as a defendant.

The principal defendant pleaded that the suit was barred by limitation; that the plaintiff had no cause of action against defendant, in that there was no order of the High Court directing Abdulla Ju to pay costs in pursuance of the

hypothecation bond ; and that the defendant was not liable until attempts to recover the costs from the principal debtor had failed.

The first Court overruled these pleas and decreed the plaintiff's claim.

The principal defendant appealed to the Divisional Judge (Mr. F. C. Channing), who dismissed the appeal.

The plaintiff preferred a further appeal to the Chief Court. The points of law raised and the decision thereon sufficiently appear from the judgment of the Chief Court which was delivered by

RIVAZ, J.—One Abdulla Ju filed a suit against the present *28th Nov. 1892.* plaintiff, the Raja of Batia, which was dismissed by the Court at Benares, within whose jurisdiction the said Raja resides. Abdulla Ju appealed to the High Court at Allahabad, and being required, under Section 549, Civil Procedure Code, to give security for the costs of the appeal, he tendered a security deed, dated 8th September 1881, under which Abdul Samad, the present defendant, agreed to be responsible to the extent of Rs. 1,400, hypothecating for the said amount an haveli situated in Sujapur. On the 5th April 1882, Abdulla Ju's appeal was dismissed with costs, and on the 23rd June 1890, the Raja of Batia brought the present suit against Abdul Samad for the recovery of Rs. 1,400 alleged to be due under the hypothecation deed.

The lower Courts having decreed the claim, defendant appeals to this Court. Of the four grounds mentioned in the written memorandum of appeal, two were argued and two were tacitly abandoned, and rightly so, as they are clearly untenable.

The grounds urged were (1) that the plaintiff's suit does not lie ; (2) that the plaintiff having by his laches allowed his decree against the original judgment-debtor to become barred, is precluded from suing the surety under the security deed.

The argument under the first head may be summarized thus: Under Section 253 of the Civil Procedure Code, a decree in an original suit may be executed against a person, who has become liable as a surety for the performance thereof before decree, in the same manner as against the defendant in the suit. Under the law as it stood before the addition of the last clause to Section 549, Civil Procedure Code, by Act VII of 1888, a

surety who became liable for the appellant's costs by furnishing security under Section 549, Civil Procedure Code, was liable to have the appellate decree for costs executed against him by reason of the provision in Section 583, Civil Procedure Code, which should be construed as rendering Section 253, applicable, *mutatis mutandis*, to appellate decrees. Moreover, the summary remedy thus provided against the surety was an exclusive remedy, and barred a regular suit. Further, it was argued that the provision in the clause added to Section 549, Civil Procedure Code, by Act VII of 1888, was merely a declaration of the existing law, and did not create any amendment of the law, and that, even if this be not so, the new rule, being a rule of procedure, came into force at once, and being in force when the present suit was filed affords an additional reason for holding that the suit is not maintainable.

In reply, it was urged that till the enactment of the last clause of Section 549, Civil Procedure Code, in 1888, the plaintiff had under the existing law no summary remedy by way of execution against the surety in the present case. That the enactment of Act VII of 1888, could not be held to deprive him of a right of action which existed at the date of the passing of the Act. That in any case the summary remedy by way of execution now afforded by Section 549, Civil Procedure Code, as amended, and allowed (*ex hypothesi*) even before the amendment, was an additional and not an exclusive remedy, so that under either view the present suit was maintainable.

The questions raised by the above contentions appear to me by no means free from difficulty, and I think the first matter to be discussed is as to the true interpretation of the law, prior to the passing of Act VII of 1888, as to the right to proceed summarily by execution against a surety, who, prior to an appellate decree, has become responsible for the appellant's costs of that appeal. Section 253 of the Civil Procedure Code applies in terms only to a decree passed in an original suit, and, prior to the enactment of Act VII of 1888, there was no provision which directly permitted execution against a surety who had furnished security for the due performance of an appellate decree, or any part thereof. Section 583 of the Code, however, provided and still provides that the decree passed in appeal shall be executed "according to the rules hereinbefore prescribed for the execution of decrees in suits."

Similar words will be found in Section 610 of the Code which relates to the enforcement of the orders of Her Majesty in Council, which are to be executed by the Court to which the order is transmitted "in the manner and according to the rules applicable to the execution of its original decrees." Both Section 610 and Section 549 of the Code have been added to by Act VII of 1888. The former section now contains a clause that "In so far as the order awards costs to the respondent, it may be executed against a surety therefor, to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant." While to Section 549 has been added a provision that if the security mentioned in the earlier part of the section be furnished, "any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the appellate Court in the same manner as if he were the appellant." The rulings of the High Courts given before the amending Act of 1888 was passed are in conflict as to the applicability of Section 253, Civil Procedure Code, to appellate decrees (by virtue of the provision in Section 583), and to orders of Her Majesty in Council (by virtue of the provision in Section 610). A majority of the High Court at Allahabad (*Bans Bahadur Singh v. Mughla Begam*, I. L. R., 2 All., 604); the Bombay High Court (*Venkapa Naik v. Baslingapa*, I. L. R., 12 Bom., 411); and the Madras High Court (*Thirumalai v. Ramayyar*, I. L. R., 13 Mad., 1), have held that Section 253 extends to all suretyships for the due performance of the appellate decree, and of the orders of the Privy Council. But this view has been dissented from in Calcutta (*Radha Pershad Singh v. Phuljuri Koer*, I. L. R., 12 Calc., 402, and *Kali Okarun Singh v. Balgobind Singh*, I. L. R., 15 Calc., 497), and by a minority of the Allahabad High Court in the case already quoted. The same question arose before this Court in 1886, (*vide* Civil Judgment, No. 109, *Punjab Record*, 1886), and was decided in accordance with the opinion of the Calcutta Court and the dissentient Judges of the Allahabad High Court. After a consideration of all the authorities, I am not prepared to differ from the ruling of our own Court. The course of legislation on the question involved appears to me of great significance. Section 204 of Act VIII of 1859 provided that "Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to

"which he has rendered himself liable, in the same manner as "a decree may be enforced against a defendant." This section, being general in its terms, was held applicable to the case of a person who had become liable for the performance of an appellate decree, or any part thereof, or of an order of the Privy Council (*vide Chandar Kant Mookerjee v. Ram Coomar Goondoo*, 3 Calc., L. R., 505, and *Chutterdharee Lal v. Ram-belashee Koer*, I. L. R., 3 Calc., 318). The Civil Procedure Code as enacted in 1877 and re-enacted in 1882, repeated in Section 253 the provision contained in Section 204 of the Code of 1859 with the addition of the words italicised, as follows: "Whenever "a person has *before the passing of a decree in an original suit*, become liable," &c. This alteration led to the conflict of opinion already noticed in the different High Courts. Act VII of 1888 was then passed, and, as before pointed out, Sections 549 and 610 of the Code were added to, so as to make it clear that a surety who had made himself liable before the appellate or Privy Council decree *for the costs of that decree* might be proceeded against by summary process of execution. I think it must be held that, under the existing procedure, a person who has become security for the due performance of an appellate decree in its entirety, *i.e.*, otherwise than in respect of costs, cannot be proceeded against summarily, or otherwise than by regular suit, and this has been so held in *Arunachellam v. Arunachellam* (I. L. R., 15 Mad., 203). If this view be correct, it appears to me to annihilate the contention that the legislature intended that Section 253, Civil Procedure Code, should be considered applicable to appellate and Privy Council decrees, by virtue of the general provision in Section 583 of the Code (which has not been modified by Act VII of 1888), and that in Section 610, as it stood before the amendment. I therefore consider the correct view to be that previous to the enactment of Act VII of 1888, Section 253, Civil Procedure Code, on its true construction, applied to decrees in original suits only, as ruled in Civil Judgment No. 109, *Punjab Record*, 1886, and that as a consequence, the plaintiff in the present case had, at the date of the decree of the Allahabad High Court, no remedy against the present defendant except by regular suit; and I am further of opinion that such remedy was not in any way impaired by the fact that in 1888 the Legislature altered the law by providing a remedy by way of execution, which, but for the law of limitation, would have been available to the plaintiff after Act VII of 1888 became law. To hold otherwise would deprive the

plaintiff of all remedy against the surety, and though the contention may be accepted, that the Code (as amended by Act VII of 1888) may in matters of procedure be held applicable to proceedings commenced before the Act came into force (as to which see *Abdul Wahed v. Fareedoonnissa*, I. L. R., 16 Calc., 323), this principle cannot be extended, I think, so as to affect substantive rights, see *Deb Narain Dutt v. Narendra Krishna* (*ibid*, 267 at page 272). It appears to me then, that the present suit is maintainable upon the grounds stated, but I may add that I should be inclined also to hold that the suit lies upon the further ground, that the remedy afforded by way of execution against the surety is an additional or alternative, rather than an exclusive, remedy. I think the principle must be accepted to start with, that a surety being no actual party either to the original or appellate decree would, generally speaking, be liable only to a regular suit in the absence of a special enactment on the subject. Further, that an enactment such as that contained in Section 253, Civil Procedure Code, cannot be taken to exclude the ordinary remedy by suit, unless there are other provisions of the Code which lead to this result. The only further provision of the Code which needs to be considered, appears to me to be Section 244, which enacts that "Questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing a decree and not by separate suit." Now, it has been held that a person who has become surety for the decree of an original Court before the decree, and has been proceeded against in execution as such, is a "party to the suit," within the above section (Civil Judgment, No. 104, *Punjab Record* 1886, citing *Ghores Lal Jha v. Sheo Narain*, 8 W. R., 24, and *Ex parte Bhikaji*, 4 Bom. H. C. R., A. C., 119), and it would appear to follow that a person who has, before the appellate decree, become surety for the performance thereof, and is proceeded against summarily in execution, is no less a "party" within the section. This in fact is almost a necessary conclusion in justice to the surety, who, if made amenable to the law as a party defendant, must be allowed the same advantages by way of appeal from orders passed against him in execution as the original judgment-debtor.

But it does not, I think, further follow that the procedure by way of execution is the only remedy available against the

surety. In a case like the present at least, where the plaintiff may be taken, for the sake of argument, to have abandoned any summary remedy against the defendant, I am disposed to think that it is open to him to proceed by way of regular suit, and if confronted with Section 244, Civil Procedure Code, to reply (a) that defendant has never become a party to the suit in the sense of the section, as no proceedings have been taken which would make him such ; and (b) that, in any case, the matter now being litigated between himself and the defendant is not one relating to the execution, discharge or satisfaction of the decree, but is a matter outside the decree, and rendered necessary by a failure to obtain satisfaction under the decree. It has, I observe, been held, under Section 204 of Act VIII of 1859, in *Abdal Kadir v. Baboo Harree Mohan* (6 N. W. P., 261) that the section quoted gives a remedy against the surety in addition to any remedy which he may have on the surety-bond, and does not prevent the decree-holder from bringing a suit on the surety-bond to enforce the contract made with him by the surety and the lien on the property mortgaged to secure the performance of the contract. I think that this may be accepted as sound law under the present Code. On all grounds, therefore, I would decide that the present suit is *prima facie* maintainable.

We have, lastly, to consider the effect upon the liability of the surety of the plaintiff's failure to take out execution against the principal debtor. It may be conceded, as it appears to have been conceded throughout, that any remedy by way of execution against Abdulla Ju is now time-barred. So far as can be gathered from the record, although the decree was transferred to the Court at Gurdaspur for execution, no further proceedings were taken, and the period for proceeding has now elapsed. Here, again, there is a conflict of authority upon the question of law involved. The provisions of the law to be considered are Sections 134, 137 and 139 of the Contract Act. Section 134 enacts that "The surety is discharged * * * * "by any act or omission of the creditor, the legal consequence "of which is the discharge of the principal debtor." Section 137 provides that "Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy "against him, does not, in the absence of any provision in the "guarantee to the contrary, discharge the surety." While under Section 139 "If the creditor * * * omits to do any act "which his duty to the surety requires him to do and the

“eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.” The Calcutta and Bombay High Courts have construed the above provisions as meaning that the mere fact that the creditor has allowed his action against the principal debtor to become time-barred does *not* discharge the surety (*Krishto Kishori v. Badha Romun*, I. L. R., 12 Calc., 330; *Hajari Mal v. Krishnarav*, I. L. R., 5 Bom., 647; *Sankana v. Virupakshapa*, I. L. R., 7 Bom., 146); and a similar view was taken by this Court in Civil Judgment No. 2, *Punjab Record*, 1878. On the other hand, the Allahabad High Court has dissented from the above rulings, and holds that the omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under Section 134 of the Contract Act, even though the non-suing within such period arose from the creditor's forbearance, Section 137 applying only to a forbearance to exercise a right which is still in existence (*Radha v. Kinlock*, I. L. R., 11 All., 310, approving *Hazari v. Chuni Lal*, I. L. R., 8 All., 259.) Here again, after due consideration, I am not inclined to dissent from the ruling of our own Court, the result of which is supported by the subsequent rulings of two High Courts. It may perhaps be doubtful whether the view expressed in Civil Judgment No. 2 of *Punjab Record* for 1878, that the legal consequence of the creditor's omission to sue or take out execution is *not* the discharge of the principal debtor, is correct, but be this as it may, I think that Section 134 must be taken to be qualified by Section 137, and that therefore the creditor's forbearance to enforce his remedy against the principal debtor, even when the result is that such remedy becomes time-barred, is not by itself sufficient to discharge the surety. If this view is correct, Section 139 also does not apply to the circumstances of the present case, as it cannot be said that it is the creditor's duty to sue the principal debtor at any particular time. Nor, I think, does the mere act of the creditor in allowing the debt to become time-barred impair the eventual remedy of the surety himself against the principal debtor. The surety, after he has paid the creditor, has his remedy against the principal debtor unimpaired, no limitation beginning to run as against the surety until the date of the payment.

In my opinion both the questions of law raised by this appeal have been correctly decided by the lower Courts, and I would therefore dismiss the appeal with costs.

28th Novr. 1892. BENTON, J.—I am of the same opinion as my learned colleague on both questions. The appeal is dismissed with costs.

Appeal dismissed.

No. 137.

APPELLATE SIDE. {

MUSSAMMAT BISHEN KOUR,—(DEFENDANT),—
APPELLANT,

Versus

PHAGGU MAL,—(PLAINTIFF),—
LAL CHAND AND RAM } RESPONDENTS.
CHAND, (DEFENDANTS),—

Case No. 804 of 1891.

(BENTON & RIVAZ, JJ.)

Hindu Law—Hindu widow—Raising money by mortgage of husband's immoveable property—Burden of proof.

P. M. sued to contest a mortgage of house property effected by his brother's widow, the said house forming part of the deceased husband's estate of which the widow was in possession.

Held, that it was sufficient to defeat an alienation of this nature that, upon the whole case, there was no proof of the mortgagees having fulfilled the legal obligation to inquire and satisfy themselves that the widow, from whom they were taking a mortgage upon her husband's inheritance, had a proper justification for so mortgaging it.

I. L. R., 14 All., 420 (P. C.) referred to and followed.

Further appeal from the decree of W. O. Clark, Esquire, Divisional Judge, Lahore, dated 4th April 1891.

Grey, for the widow.

Madan Gopal, for the plaintiff.

The plaintiff sued for a declaration that a mortgage effected by Mussammat Bishen Kour, widow of Bura Mal, an Arora of the city of Lahore, of a house situate there for Rs. 1,000, should not affect his (the plaintiff's) reversionary rights. The plaintiff and Bura Mal, deceased, were brothers. The defence was that the money was borrowed for necessary purposes. The first Court (Sayad Ibrahim Ali, Subordinate Judge) decreed the plaintiff's claim.

The widow alone appealed to the Divisional Judge (Mr. W. O. Clark), who allowed her Rs. 500 as "a reasonable sum to fix as proper and necessary expenditure on the daughter's marriage."

The widow had also alleged expenditure in performing the *chaubarsi* ceremony in memory of her deceased husband, but this the Divisional Judge held not proved.

Both the plaintiff and the widow appealed to the Chief Court. The judgment of the Court was delivered by

RIVAZ, J.—In this suit the plaintiff, Phaggu Mal, seeks for a declaration that a mortgage of certain ancestral property, *viz.*, a house situate at Lahore, by his deceased brother's widow Mussammat Bishen Kour, under a registered deed, dated 27th February 1890, is without any lawful necessity, and will not affect the plaintiff's right as his brother's heir. The defence was that the mortgage money (Rs. 1,000) was advanced for a necessary purpose, *viz.*, to meet the marriage expenses of a daughter, and for money spent by the widow in performing the *chaubarsi* ceremony in memory of her deceased husband. The first Court decreed the claim, but the Divisional Judge considered that the mortgage must be held binding upon the plaintiff to the extent of Rs. 500. 24th Novr. 1892.

Both the plaintiff and Mussammat Bishen Kour have appealed to this Court, but the mortgagee-defendants have appealed neither to the Divisional Court nor to this Court. Both appeals may be disposed of in one order.

After hearing the case fully argued, we have come to the conclusion that the following points are established by the evidence upon the record. That Bura Mal (the widow's husband) who died about three and a half years before suit, left a considerable estate, consisting of both moveable and immoveable property, which was inherited by his widow, and which, as regards the moveables, there is reason to believe she has not expended during the period between her husband's death and the date of suit. That money was spent about the time of the mortgage transaction upon the marriage of Bura Mal's daughter, but that no expenditure is shown to have been incurred upon the *chaubarsi* ceremony, nor is it even proved that any such ceremony actually took place. That the mortgagee (*vide* his own statement) though he knew that the marriage

of a daughter was in contemplation, took no steps to discover whether the widow had funds of her own derived from her husband's estate to meet the expenses of the marriage. That plaintiff (*vide* his notice of the 10th July 1889) warned the defendant, mortgagor, not to charge the immoveable property on account of her daughter's marriage, pointing out that she had jewels and other moveables out of which all necessary expenses could be paid : otherwise he (plaintiff) was prepared himself to expend what was required. That the mortgagees themselves being doubtful as to whether the transaction would stand, took for their own protection a security bond for Rs 1,000 from Lala Maksudan Mal, a relative of the widow. That probably Rs.1,000 represent a sum considerably in excess of what was actually spent upon the marriage expenses of the daughter.

With reference to the above findings, we think we must hold that the plaintiff is entitled to succeed wholly in his claim upon the ground, that the defendants (upon whom the onus lies) have failed (to use the language of their Lordships of the Privy Council in a very recent case, *Amarnath Sah v. Achan Kuar*, I. L. R., 14 All., 420) to fulfil their legal obligation "to inquire and "satisfy themselves that the widow from whom they were taking "a charge upon her husband's inheritance had a proper justification for so charging it " It is obviously not sufficient for the defendants in the present case to allege and prove merely that they satisfied themselves that money was required for the marriage expenses of a daughter, without also satisfying themselves that the widow could not meet legitimate expenses without charging the ancestral immoveable property. As we have already stated, we consider that there is strong affirmative evidence the other way, which has not been rebutted, and which at least, when coupled with the mortgagee's own admission as to his apathy in the matter of inquiry as to the widow's means, justifies a decree in plaintiff's favour.

We dismiss the defendant's appeal; we accept the plaintiff's appeal and decree the plaintiff's claim with costs throughout.

Plaintiff's appeal allowed : defendant's appeal dismissed.

No. 138.

HAKU AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

KESAR AND ANOTHER,(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 841 of 1891.

(BENTON & RIVAZ, JJ.)

Custom—Alienation—Unequal distribution of ancestral land between sons and son's sons—Jats of tahsil and District Hoshiarpur.

Found in a suit the parties to which were Jats of Nangal Ishar, tahsil and District Hoshiarpur, that :

- (a) the onus of proving a custom empowering a father to make an unequal distribution of his ancestral holding was on the person relying on such a custom ; and
- (b) that the defendants, who relied on such a power, had failed to establish it.

Punjab Record, No. 164 of 1884, and Nos. 7 and 115 of 1891, referred to.

Further appeal from the decree of G. W. Rivaz, Esquire, Divisional Judge, Hoshiarpur, dated 17th March 1891.

Bates, for appellants.

Browne, for respondents.

Sobha, a Jat of Nangal Ishar, tahsil and District Hoshiarpur, was the proprietor of a holding of 357 kanals 18 marlas of land,—257 kanals 1 marla khud-kasht and 100 kanals 17 marlas cultivated by occupancy tenants.

The two plaintiffs were the sons, and the defendants the grandsons (sons of Desa, deceased), of Sobha. The plaintiffs sued for a two-thirds share of their father's land.

The defendants pleaded that Sobha during his lifetime divided his land amongst his sons and grandsons, reserving 64 kanals 5 marlas for his own maintenance, and that in 1887 he made a gift of this reserved share and of one-fourth of the land under occupancy tenants, to them, the defendants, who thus, on Sobha's death, came into possession of half of the whole khata.

The first Court (Lala Shib Narain, Extra Assistant Commissioner) decreed the plaintiffs two-thirds of the khata, which it found to be joint. The Court held that the onus was on the defendants to show that Sobha was empowered by custom to make such a gift, and that they had failed to discharge it, and

also that there was no complete partition of the khata during Sobha's lifetime. On this latter point the Court said: "All that can be inferred is that it was a separation of possession for the purposes of cultivation: it does not appear that the plaintiffs had accepted separate possession of their shares in full discharge of their rights as sons, leaving the father to do as he wished with the fourth share."

The Divisional Judge (Mr. G. W. Rivaz) dismissed the defendants' appeal. He was of opinion that: "The decision of the lower Court seems to me perfectly correct. I agree in the findings that the land in dispute is ancestral property: that no complete and final partition was made in the father's lifetime: and that the defendants have failed to establish that their father could by custom make an unequal distribution of his ancestral property between his sons."

The defendants preferred a further appeal to the Chief Court. The judgment of the Court was delivered by

28th Novr. 1892.

BENTON, J.—The parties are the two sons of one Sobha, viz., the plaintiffs, and the sons of a third son. They are Jats of the Hoshiarpur tahsil of the Hoshiarpur District. The plaintiffs sued to obtain an equal share of the ancestral inheritance, of which the defendants are in possession of half instead of one-third. It was alleged that this result had come about by the father, Sobha, having first made a partition in his lifetime and by his afterwards giving his own one-fourth share along with a one-fourth share in the occupation of occupancy tenants to the defendants. The khata is, however, according to the records, an undivided one, and the conclusion arrived at by the Courts below was that there had been as yet no permanent partition, but only a distribution for the sake of enjoyment. The Courts below concurred in decreeing the plaintiffs' claim, holding that the burden of proving a power of the father according to custom to make an unequal division was on the defendants, and that it had not been discharged. In arguing the appellants' case, Mr. Bates disputed the correctness of the view taken as to the burden of proof, and contended that a father might just as well bestow a gift on a favourite son who had done him service, as a childless proprietor might make a gift in favour of some relation who had done him service. He referred to a case in which this had been permitted.

We are of opinion that the conclusion arrived at by the Courts below, as well as their views in regard to the burden of

proof, is quite correct. As regards the burden of proof, *Punjab Record*, No. 164 of 1884, and *Punjab Record*, No. 7 of 1891, might be quoted among many others. In *Punjab Record*, No. 115 of 1891, which is the case referred to as No. 2342 of 1888 in the first Court's judgment, being then unpublished, and is case from the same district, the matter now in dispute was decided by this Court, and an unequal division was disallowed after due consideration of the question of custom and reference to the *Riwaj-i-am*, which is clearly opposed to it.

We therefore affirm the decree of the lower Court, and dismiss the appeal with costs.

Appeal dismissed.

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No. 139.

RUSTAM KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT JIO AND HABIB KHAN,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 577 of 1891.

(BENTON & RIVAZ, JJ.)

Custom—Succession—Married and unmarried daughters—Resident son-in-law—Manjh Rajputs (Mussalmans) of tahsil and District Ludhiana.

Found in a suit the parties to which were Manjh Rajputs (Mussalmans) of Raisur, tahsil and District Ludhiana—

(1) That no custom was established by which a married daughter succeeded as heir to her father in the presence of collaterals, even with a life interest; and

(2) that a resident son-in-law as such was in no better position than the daughter, custom also not recognizing his right in the presence of the collaterals of his father-in-law.

*Further appeal from the decree of G. Leslie Smith, Esquire
Divisional Judge, Umballa, dated 18th April 1891.*

Gouldsbury, for appellants.

Pyari Lal, for respondents.

The questions for determination in this appeal had reference to the succession to the estate of Muhammad Husain who died in 1857. The succession was disputed at that time. The deceased's daughter, Mussammat Jio, who was married to the defendant Habib Khan, made no claim herself; but her

husband alleged that he had been brought up in the house of Muhammad Husain for fifteen years and had married his daughter. He claimed the deceased's land as his appointed heir.

After enquiry, mutation of names was made in favour of Mussammatt Jio for her life with the assent of the collateral heirs of Muhammad Husain.

The parties were Mussalman Manjh Rajputs of Raisur, tahsil and District Ludhiana.

At the present Settlement of the district, Mussammatt Jio was recorded as owner, and in 1888 her husband sued her and obtained a decree declaratory of his title.

The plaintiffs, the next reversioners of Muhammad Husain, now sue for a declaratory decree that this declaration will have no effect upon their rights.

The case came before the Chief Court on a previous occasion when the decree of the Divisional Judge (Mr. G. Leslie Smith), which reversed the decree of the District Judge of Ludhiana, was set aside and the case remanded to him for a fresh decision under Section 562, Civil Procedure Code.

The Divisional Judge again reversed the decree of the District Judge and dismissed the plaintiff's suit.

The plaintiffs again preferred a further appeal to the Chief Court which remanded the case under Section 566, Civil Procedure Code, for inquiry on the following points —

- (1). According to the custom prevailing among the tribe and class to which the parties belong, does a daughter succeed as heir to her father to the exclusion of his collateral heirs; or does she take his estate for her life only on the usual tenure of a female?
- (2). Does a resident son-in-law by the mere circumstance of his being khana-damad, without anything more, succeed as heir to his father-in-law's lands in preference to the latter's:
 - (a) daughter;
 - (b) near male collaterals?

The interlocutory order of remand under Section 566 was delivered as follows by

30th June 1892. **BULLOCK, J.**—The land in suit was owned by Muhammad Husain, whose daughter Mussammatt Jio is married to the

defendant Habib Khan. Muhammad Husain died in 1857, and the succession to his estate was disputed. Mussammat Jio herself made no claim to it, so far as appears from the records, but Habib Khan did. He alleged that he had been nurtured in the house of Muhammad Husain for fifteen years, and had married his daughter some four years before the date of his examination; he claimed the land to be his own as the appointed heir of Muhammad Husain, and demanded that mutation should be effected in his favour; and there can be no doubt that he was then in possession of the land, and had been so during the lifetime of Muhammad Husain. An inquiry was made by the Collector; and, on the next heirs of Muhammad Husain agreeing that Mussammat Jio should keep possession for her life, it was ordered that mutation should be made accordingly: this was in 1859.

At the present Settlement, Mussammat Jio was recorded as owner; and in 1888 Habib Khan sued her, and on her confession obtained a decree declaratory of his title. The plaintiffs, who are next reversioners of Muhammad Husain, now sue for a declaration that the decree is of no effect upon their reversionary rights.

It is not very clear upon what grounds the District Judge formed his opinion, but, so far as can be gathered from the judgment, it seems to proceed upon a misconception both of the facts and of the law. He appears to attribute to the proceedings of the Collector, the force of an adjudication of the title by a Court of competent jurisdiction: thus, he speaks of the Collector having disallowed the defendant's claim to be heir as khana-damad; and he holds the defendant to be now estopped from setting up a claim to be khana-damad by reason of his acquiescence in the entries made in favour of Mussammat Jio. But it is quite clear that the entry does not conclude the question of the defendant's title, and that there is no estoppel at all. The defendant never admitted Mussammat Jio to possess any proprietary title, nor did she claim to possess it. Habib Khan denied the rights of the plaintiffs and claimed the land as his own, and he has continued to possess it upon the ground of his original claim up to the present time: the contention that he has been holding on behalf of Mussammat Jio is altogether contrary to the fact.

A document has been put in by the plaintiffs, which purports to proceed from Habib Khan, and to be an admission of

Mussammat Jio's interest being only for her life, and an acknowledgment that on her death the land will revert to Dawlat Khan.

This document is not admitted by the defendant nor has it been proved: it is not alluded to in the District Judge's judgment, and it appears to be of no value whatever. It purports to bear date in 1855, that is, long before the death of Muhammad Husain.

The main question for decision is whether Mussammat Jio's rights in her father's land are limited to the usual life tenure of a female: if they are, then the plaintiffs, who are the next heirs, may maintain their suit for the declaration asked for; but on the other hand, if Mussammat Jio was entitled as full heir to her father, there is no question of a reversion to the heirs of her father on her death, though a question may in future arise as to the succession to herself.

It appears to be sufficiently proved that Habib Khan resided in his father-in-law's house, but we do not think that there was any formal appointment of him as heir to Muhammad Husain. The opinion of the Divisional Judge, that succession as an heir owing to the mere fact of a son-in-law residing with his father-in-law is a general and well established custom, does not appear to rest upon any solid ground. We should be inclined to think that the contrary opinion would be nearer the truth. The case must go back to the first Court for trial of the following questions and findings thereon, to be returned within two months through the Divisional Judge, who is requested to add his own opinion—

1. According to the custom prevailing among the tribe and class to which the parties belong, does a daughter succeed as heir to her father to the exclusion of his collateral relations or does she take his estate for her life only on the usual tenure of a female?
2. Does a resident son-in-law, by the mere circumstance of his being khana-damad without anything more, succeed as heir to his father-in-law's lands in preference to the latter's:
 - (a) daughter;
 - (b) near male collaterals?

In order to determine on whom the onus of proving or disproving the second issue will lie, the Court should consult the *Wajib-ul-arz* and *Risaj-i-am*: and unless they contain a rule sup-

porting the affirmative of the issue, the onus of proof will be on the defendant.

Upon a return being made to the above order of remand the judgment of the Court was delivered by

RIVAZ, J.—A return has now been received to the order of *2nd Decr. 1892.* this Court, dated 30th June 1892. A very full inquiry has been made into the issues remanded for trial, and the District Judge of Ludhiana (Lala Arjan Singh) has submitted a report (in the conclusions of which the Divisional Judge concurs) elaborately summing up, after a complete analysis of the whole evidence, the result of the inquiry. The findings arrived at are—

- (1). That no custom has been established as prevailing in the tribe to which the parties belong (Manjh Rajputs of the Ludhiana District) by which a daughter succeeds as heir to her father, in the presence of collaterals, even with a life interest, the only exception being in the case of unmarried daughters who are sometimes permitted to remain in possession of their father's estate till their marriage;
- (2). That the resident son-in-law, as such, is in no better position than the daughter, custom also not recognizing his right in the presence of the collaterals of his father-in-law.

In the above findings, after perusing the record and hearing defendant's pleader, we entirely agree. The instances and other evidence relied upon by the defendants fail, in our opinion, to establish any thoroughly reliable precedent of the succession of a married daughter or a khana-damad where there were collaterals of the deceased male owner. The inquiry has been confined to the Manjh gôt of Rajputs, inasmuch as they are said to be a large and influential gôt, who afford full scope for the investigation of their special customs. Thirteen cases, of which only a few came into Court, were relied upon by defendants as proving the custom in their favour. A careful examination of these cases shows that, even assuming them all to be genuine cases and sufficiently proved as to the facts by the evidence (which is mostly oral) in support of them, only two instances are forthcoming in which the khana-damad appears to have succeeded without objection by the collaterals, though in one of these cases the facts are obscure, while in only one of the instances cited does a daughter appear to have succeeded to a portion of her father's estate, though here

again the facts are not clearly elucidated. The cases which came into Court were either disposed of on technical points, or resulted in a compromise. In one case from the Phillour tahsil, adverse possession by the daughter was held to be established on the ground that there was no custom prevailing among Rajputs of the Manjh gôt, whereby the daughter could inherit the estate of her deceased father (*vide* the judgment of the Additional Commissioner, Jullundur, dated 7th August 1879). The eighteen precedents relied upon by the plaintiffs are perhaps scarcely less inconclusive than the defendant's evidence, to establish affirmatively a custom by which the daughter is excluded, but plaintiffs produce at least one strong judicial decision, *viz.*, the case of Ala Bakhsh v. Banne Khan, decided by the District Judge of Ludhiana on the 1st June 1885, and by the Divisional Court on the 27th April 1886, in which both Courts concur in holding that the custom of the Manjh Rajputs of the locality recognizes no right of inheritance in the khana-damad. Our attention has also been directed to Civil Judgment No. 176, *Punjab Record*, 1882, where it was found that among Manjh Rajputs of the Nakodar tahsil collaterals succeeded in preference to the (married) daughters of a deceased proprietor. Lastly, the result of the present investigation is quite consistent with the conclusions arrived at by Mr. Walker, and embodied in his Customary Law of the Ludhiana District. In answer to the question (page 61, Question 44 (iii)) "If a married daughter and her husband live with the father till his decease, can the daughter inherit?" It is stated "Under such circumstances, the daughter and her husband have no rights over the immoveable property of the father, except in the case of the four tribes mentioned at the conclusion of the last paragraph." (*viz.*, Awans, Gujars, Labanas and Dogars). " * * * * * No other tribe admits the right of the daughter or her husband to succeed to immoveable property, if there are collaterals within a recognizable degree of relationship." And again at page 70, in the answer to question 71, Mr. Walker records—"No tribe recognizes the right of the son-in-law under any circumstances; but the right of the daughter and her male issue to succeed is acknowledged by the two or three tribes mentioned in the answer to Question 44."

The above extracts afford very strong corroboration of the findings arrived at in the present investigation, in which we entirely concur.

An attempt was made to argue in the present case that Habib Khan had perfected a title to Muhammad Husain's estate by twelve years' adverse possession. This matter was disposed of by the Divisional Judge in the judgment under appeal, but was apparently again agitated in this Court at the last hearing. We are doubtful if the point can be considered still open in face of the remand order of this Court, which was quite unnecessary, unless this Court concurred in the Divisional Judge's view as to the nature of Habib Khan's possession since Muhammad Husain's death; but we may observe that, in view of the proceedings before the Collector in 1859, and Habib Khan's subsequent acquiescence in what was then arranged, we should find it impossible to hold that he has been in possession as a claimant in his own right, or otherwise than on behalf of his wife Mussammat Jio.

In our opinion, the plaintiffs are entitled to a decree, and we think that the declaration in their favour should be to the effect that the right which they have established in the present case to succeed as heirs of Muhammad Husain after the death of Mussammat Jio as against the defendant Habib Khan, will not be prejudicially affected by the collusive decree obtained by Habib Khan against Mussammat Jio on the 18th April 1888. The plaintiffs will also get costs of all the Courts.

Appeal allowed.

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No. 140.

SAIN DAS,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMAT SAHIB DEVI, WIDOW OF SURJAN
SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1027 of 1891.

(BENTON & RIVAZ, JJ.)

Hindu Law—Joint family—Partial disruption—Presumption—Management of religious institution—Founder's rights.

The presumption in favour of a Hindu joint family remaining joint is no longer applicable when it is admitted that a disruption of the family has once taken place. *Punjab Record*, No. 143 of 1882, referred to and followed.

There is no authority for the proposition that the management of a Hindu religious or charitable institution is on the footing of a joint tenancy and that the succession goes to the survivor.

First appeal from the decree of W. A. Harris Esquire, District Judge, Lahore, dated 31st July 1891.

K. P. Roy, for appellant.

Rattigan, for respondent.

This case is the sequel to that reported as *Punjab Record* No. 130 of 1892, in which the widow, Mussammat Sahib Devi, was granted letters of administration with copy of the will annexed as universal or residuary legatee of her deceased husband's will.

In the present case, the widow sued her husband's brother to recover from him possession of her husband's estate, in terms of his will. The deceased was an Arora, carrying on business as a halwai in Lahore city.

The District Judge, Lahore (Mr. W. A. Harris), made a decree in the plaintiff's favour except as to two cash items and half the utensils of the shop.

Both parties appealed to the Chief Court.

The main questions for determination were as to whether the defendant, the deceased, and the other brothers formed a joint Hindu family; and as to the widow's right to the joint management of the family thakurdwara and dharmshala.

The judgment of the Chief Court was delivered by

28th Nov. 1892.

BENTON, J.—The plaintiff, the widow of Surjan Singh, sued her brother-in-law Sain Das, under her husband's will, to recover from him possession of her husband's estate as set forth in the will, dated 11th May 1889, the day of Surjan Singh's death. The plaintiff had on the 14th July 1890 obtained probate of the will with grant of administration as executor of her husband's will by implication. There is an appeal before us in that case also, and we have decided not to modify the terms of the order of the lower Court, so that the plaintiff's position in regard to this case is in no way affected.

The lower Court decreed the plaintiff's claim with the exception of Rs. 1,100 alleged to be due on a book account and Rs. 600 on account of half the outstandings and joint stock of the shop kept by Sain Das and the deceased. It allowed plaintiff half of the utensils of the shop, without specifying the value. It allowed the plaintiff costs, save on the Rs. 1,100 and Rs. 600 disallowed, and it refused the defendant costs on these sums.

Both parties appealed, the plaintiff against the decree, so far as it is against her, with an objection to the omission to fix the value of the shop utensils, and the defendant against the whole decree.

The will shows that a certain Salo was the adopted son of the deceased. Provision is made in the will for an allowance to him. He has not been made a party. In the lower Court, the defendant put it forward as one of his pleas that the will was invalid as being in derogation of Salo's rights, and he maintained that he was entitled to use this plea as he would be entitled to succeed to Salo in case of his demise. This plea in one of the grounds of appeal. We do not feel called on to give any opinion with regard to Salo's rights, he not being before the Court. It is sufficient for us, we consider, to see that *prima facie* the plaintiff is entitled to claim under the will what she sues for, and to say that the defendant cannot be permitted to shield himself by putting forward a *jus tertii* which is a mere possibility.

Another objection is that the plaintiff is not entitled to bring this suit until the probate case is finally decided in her favour and she is declared to be executor. This objection is unavailing seeing that the provisions of Section 187 of the Succession Act, 1865, have not been reproduced or made applicable generally in the Probate and Administration Act, 1881, and there was no obligation on the plaintiff to obtain probate or letters of administration before she could bring her suit on the will (*Henderson on Wills*, 322).

The defendant's main objection and his substantial defence to the suit was, that his brother and he formed a joint Hindu family: that the property was joint, and he succeeded to the whole of it as survivor: and that Surjan Singh had no power to make a will. This entailed a discussion with regard to the burden of proof. The learned pleader for the defendant maintained that the brothers having once formed a joint Hindu family along with two other brothers, who had separated, there was, notwithstanding this separation, a presumption that these two brothers continued joint, and that it was for the plaintiff to prove an actual separation, and that failing to do so this presumption overbore any facts in the case which pointed in a different direction. In support of this contention he referred to I. L. R., 5 Calc., 474, I. L. R., 9 Calc., 817, and I. L. R., 12 Calc., 262. These rulings, however, when examined do not

appear to support the, contention, and, on the other hand, it has been expressly ruled by this Court in *Punjab Record*, No. 143 of 1882, that the presumption in favour of a Hindu joint family continuing joint is no longer applicable when it is admitted that a disruption of the family has once taken place. In that case a ruling of the Privy Council reported in I. L. R., 3 Calc., 315, was cited and followed, the facts in which bear a very close resemblance to those of the present case. The facts in it are such that in fact they leave very little room for the operation of any presumption one way or the other. There were originally four brothers. The sole joint property was one house. The brothers divided the house and separated, the other two retaining the house and giving Surjan Singh and Sain Das Rs. 190 for their share. The latter two got Rs. 10 more from their mother and started the shop which is part of the property now in dispute. That was doubtless a joint concern. The business was a prosperous one. The brothers were enabled to purchase or take property on mortgage,—so many properties were taken, and the conveyances executed and registered in the name of one brother, and so many in the name of the other. Each brother would appear to have managed the property that stood in his name, as leases were executed in his favour. The brothers all the while lived separately from the time they had separated from the other two, each having the same fixed daily allowances for his maintenance. As to worship, the evidence as to the performance of *sradhs* is consistent either with separation or union. A *dharmsala* and a *thakurdwara* were founded and maintained from the proceeds of the profits of the shop. It is alleged by Sain Das that the transfers of property being executed in the name of one brother or of the other were mere matter of accident and convenience, but we cannot, surveying all the circumstances, accept this statement as correct. We are clearly of opinion that the property so dealt with was the separate property of the brothers as found by the lower Court.

The plaintiff has been decreed the joint management of the *thakurdwara* and the *dharmsala*, with property attached, along with Sain Das. The learned pleader for the defendant maintained that the management of these institutions by their founders was on the footing of a joint tenancy and that the succession went to the survivor, but he admitted that he was unable to quote any authority. On the other side, *Mayne's Hindu Law*, Section 399 (Fourth Edition) was quoted, and it appears

to completely support the lower Court's decree in favour of the plaintiff, that she is entitled to succeed to a share in the management as Sain Das's heir.

The decree of the lower Court is doubtless at fault, inasmuch as it does not assign a value to the half of the vessels decreed. We regret that, on examining the record, we are unable to find any evidence which would enable us to amend it in this matter, which is, however, of trifling importance.

As regards the alleged debt of Rs. 1,100 and the value of the stock claimed, we are of opinion that the mention of them in the will was sufficient justification for the plaintiff including them in her plaint in the hope that she might be able to prove them by reference to the books or otherwise. The books were called for, but they do not appear to have been properly examined to ascertain the contents. As the plaintiff failed to substantiate this portion of her claim it was properly dismissed by the lower Court without allowing her costs. The mention of these sums in the will was a sufficient reason, in our opinion, for not allowing the defendant costs on this part of the claim, although successful.

The result is that we affirm the decree of the lower Court, and dismiss both appeals with costs.

Appeal dismissed.

No. 141.

DINA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

DANA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 891 of 1891.

(BENTON & RIVAZ, JJ.)

Indian Limitation Act, Schedule II, Article 142—Alienation by deceased sonless proprietor—Discontinuance of possession—Date on which cause of action arises.

In a suit brought in 1890 by the plaintiffs for their share by inheritance in the estate of K., a childless proprietor, who died $2\frac{1}{2}$ years before suit, it appeared that in 1874 K. had transferred his rights in the disputed land to defendant's father, and given him possession, which had continued with defendants and their father up to the time of suit.

Held, that the claim was barred by limitation under Article 142 of the 2nd Schedule of the Limitation Act, as K., from whom plaintiffs derived their right to sue, had discontinued possession in 1874, and more than twelve years had elapsed between that date and the filing of the present suit.

Punjab Record, No. 48 of 1885, and Nos. 10 and 116 of 1890, referred to.

Further appeal from the decree of Lieutenant Colonel H. M. M. Wood, Divisional Judge, Jullundur, dated 15th June 1891.

Lal Chand, for appellants.

The plaintiffs in this case sued for possession of 30 kanals 10½ marlas of land situate in Talwandi Bharro in the Jullundur District. The claim was based on the following allegations :

That Karim, who was one of four brothers, died childless, leaving 91 kanals 10½ marlas of land : that his land should therefore be divided into three shares, one-third going to each brother or his descendants.

The plaintiffs were nephews, and the defendants a brother and two nephews, of Karim.

The defendants 1 and 2, the nephews, pleaded that Karim had sold all his land to their father, Umra, for Rs. 600 : that mutation of names had been effected on the 25th February 1874 : and that since then their father, and after him they his sons, had been in adverse possession of the land.

The first Court found that Umra took possession of the land by transfer under a gift in 1874 of which the plaintiffs' father had knowledge : that this possession was adverse from the date of the dakhil kharij when the objection of Azim, the plaintiffs' father, was disallowed : and that the defendants had therefore been in adverse possession for more than twelve years. The Court therefore dismissed the suit as barred by time.

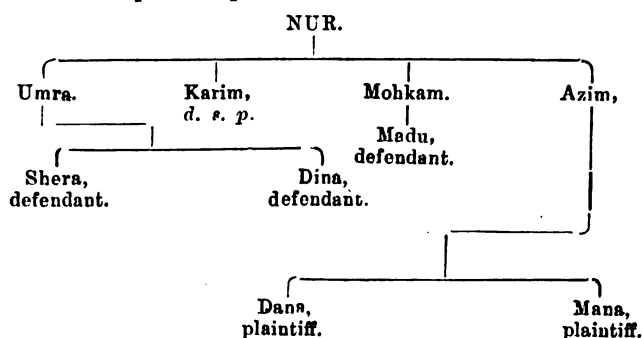
The Divisional Judge reversed this decree upon appeal and gave the plaintiffs a decree for the one-third share of the land claimed. His reasons were as follow : " The lower Court " held that no sale took place as no consideration was proved " to have been paid, but held that an alienation of some kind " had been made, and that this sale without consideration must " be held to be a gift. I cannot understand on what principle " the lower Court has arrived at this extraordinary conclusion. " *Punjab Record*, No. 79 of 1889, is referred to as an authority, " but it has nothing to do with the question.

" A sale was alleged by the defendants and they must " prove the fact or fail. They have not proved the alleged " sale and the conclusion of the lower Court, that there was " therefore a gift is set aside as absurd. No alienation by " Karim in favour of Umra has been proved, and the cause of " action, as laid by the plaintiffs, clearly arose on the death " of Karim, less than three years ago, so that the suit is within

"time. I accept the appeal and decree for the plaintiffs' possession of one-third of the land left by Karim, with costs throughout."

The defendants appealed to the Chief Court contending that the Divisional Judge was in error in holding that the plaintiffs' cause of action arose on the death of Karim, and that the suit was barred by limitation. The judgment of the Chief Court was delivered as follows—

RIVAZ, J.—The following pedigree table shows at a glance the relationship of the parties—



The plaintiffs, the sons of Azim, claim one-third of the estate of their uncle Karim, who died about two and a half years before the present suit, which was lodged in May 1890. The whole of Karim's estate is in the possession of the defendants Shera and Dina, the sons of Umra, and they claim to be owners thereof by virtue of a sale by Karim to their father, Umra, in 1874, which was given effect to in the Revenue papers of that year, though no deed of sale was executed. The defendants further pleaded that the suit was barred by limitation.

The first Court found that Karim certainly transferred his land to Umra in 1874, by getting the latter's name substituted for his in the Revenue papers, and giving him possession. As to whether any actual consideration passed, the first Court was doubtful, but it held that the transfer could be supported either as a gift or sale, and that in either case the suit was time-barred.

The Divisional Judge reversed this decision. He held that the defendants must prove the sale for consideration alleged by them or fail in their suit. He found that no consideration was proved to have passed: that the first Court's view that, if this were so, the transaction must be regarded as one of gift, was not tenable: that therefore no alienation

by Karim in favour of Umra was proved, and the claim was within time and must be decreed.

In this Court, the defendants contend that the judgment of the first Court is correct, and that the suit is barred by limitation.

A careful perusal of the dakhil kharij file of 1874, which is still extant, leaves no doubt in my mind that Karim made an out-and-out transfer of his land to his brother Umra, either with or without receiving consideration from him, which point may be admitted to be doubtful, and relinquished possession in Umra's favour. On the 8th February 1873, Karim filed an application stating that he had sold his share to Umra for Rs. 600, which amount he had received in full, and asked for mutation to be ordered in the alienee's name. On examination by the Revenue Officer, he confirmed this statement, and the usual proclamations followed. Dana, one of the present plaintiffs, then came forward and objected to the alienation and was referred to a regular suit to establish the invalidity of the transaction by order dated 14th October 1873. On the 14th February 1874, the matter was again brought forward: it was stated in the Tahsildar's order of that date that the sale was *prima facie* a genuine one: that the objector had filed no suit to challenge it, though directed to do so: that the objections appeared frivolous, and that mutation of names, as prayed, was therefore recommended. On the 25th February 1874, the Deputy Commissioner ordered that *as possession had been given*, and no suit had been filed by the objector, dakhil kharij was sanctioned. It further appears that during the recent Settlement, when the *fard badr* was being prepared in May 1884, Azim, the father of the plaintiffs, came forward with the objection that ten years ago Karim had sold his land to Umra and *given him possession*, but that he (Azim) objected as he had a right of pre-emption. An inquiry was made as to who had actual possession of Karim's land, and it being found that Umra had been in possession for a long time, it was ordered that the entry should be in his favour. The above proceedings appear to me to establish conclusively (and there is no rebutting evidence) that in 1874 Karim transferred his property to Umra and put him in possession, which has continued with Umra and his sons up to the date of suit. I think therefore that the first Court is correct in holding that it is immaterial to defendants' case whether they can prove the actual passing of consideration or not. It is sufficient for

them to affirm and prove that there was an absolute transfer, followed by possession.

The question which then arises for decision is, whether, upon the above findings, the claim is within limitation. Defendants rely upon their possession for twelve years as barring the suit. Plaintiffs claim that their cause of action arose only at the date of Karim's death. The point is exactly similar to that decided by a single Judge of this Court in Civil Judgment No. 10, *Punjab Record* of 1890, a case which has been approved and followed by a Division Bench in *Rám Bakhsh v. Moga* (Civil Appeal No. 2042 of 1888), not reported.*

Under the authority of those rulings, the present suit is barred by limitation, on the ground that, from the date of the alienation, the possession of the alienee became adverse to the owner, and to all persons claiming under him, the case of a childless proprietor in the Punjab not being analogous to that of a widow with what is usually called a life interest,—the childless proprietor being full owner, though his power of disposition may not be absolute, and his alienations may be voidable by his heirs. It cannot therefore be said that any fresh cause of action accrues to the reversioner, or other heir, upon the proprietor's death, as in the case of the Hindu widow, who is not full owner, and whose successors are the heirs, not of herself, but of the last owner before her. This ratio was approved of by the Full Bench in Civil Judgment No. 116, *Punjab Record*, 1890, where, however, the point decided was that a suit like the present was not barred by time if brought *within* twelve years of the alienation impugned, even though no declaratory suit had been brought within six years during the alienor's lifetime to establish that the alienation would not bind the heirs. In that case the Court observed—"We adopt the view that a childless proprietor is full owner of ancestral property in his possession "notwithstanding that his power of disposition is not absolute." It is further laid down by the Full Bench, that a suit of this nature would appear to be governed, as regards limitation, either by Article 140 or Article 144 of the 2nd Schedule of the Limitation Act.

The only hesitation which I have felt in accepting the decision in Civil Judgment No. 10, *Punjab Record* of 1890, in its entirety, is owing to a doubt in my mind whether, assuming that Article 140 of the 2nd Schedule of the Limitation Act is

* NOTE.—Printed as a footnote to this case.

not applicable to the suit, Article 144 is the governing provision. As to Article 140, I think it should be held inapplicable for reasons similar to those indicated by Mr. Justice Barkley in Civil Judgment No. 48, *Punjab Record*, 1885. But eliminating Article 140, it does not follow that Article 144 must be applied, that Article only referring to suits not "otherwise specially provided for." But it appears to me that Article 142 exactly meets the present case as one "for possession of immoveable property, when the plaintiff" (in which term must be included "any person from or through whom a plaintiff derives "his right to sue," *vide* Section 3 of the Act), "while in possession of the property * * * has discontinued the possession," the period prescribed being twelve years from the date of the discontinuance. "Discontinuance of possession," I understand to mean the "going out of the person in possession, followed by the "possession of others," *per* Fry, J. in *Rains v. Buxton* (L. R., 14, Chan. Div., 537), and I think this exactly meets the case of a vendor, or donor, surrendering possession to his vendee or donee. If this view is correct, it removes a doubt which I have felt as to whether the possession of an alienee holding under the act and deed of his alienor can be said to be *adverse* to the alienor and to those who claim after him: for by "adverse possession" I would understand "any possession inconsistent with the title of the lawful owner" (Banning on Limitation, Second edition, 101), or, to adopt Mr. Justice Markby's definition, "possession by a person holding the land on "his own behalf, or on behalf of some person other than the "true owner, the true owner having a right to immediate "possession" (*Bejoy Chunder v. Kally Prosonno*, I. L. R., 4 Calc., 327). I do not mean to say that I consider the suggested difficulty insuperable. My view as to what constitutes "adverse possession" may be too narrow, or the clue may lie in the theory that for the purposes of limitation the defendants may be taken to have accepted the plaintiffs' view that the alienee never became the "lawful owner," the alienor still remaining so, and to argue that even on this assumption of the fact, the suit is barred. But be this as it may, I am inclined to hold to the view above expressed that the present suit is governed as regards limitation by Article 142 of the 2nd Schedule of the Limitation Act, and is barred under that Article.

I do not think that any reference to a Full Bench is necessary upon the present occasion. I am proposing in the

present order to follow in principle two decisions of this Court, strictly to the point, which were cited without any suggestion of disapproval in the judgment of the Full Bench, which followed in point of time, and any divergence of opinion is on a small matter of detail, which in no way affects the ultimate decision.

I would accept this appeal and dismiss the plaintiffs' suit as barred by limitation, with costs throughout.

BENTON, J.—It has been fully demonstrated that there was a complete transfer of the property from Karim to Umra in 1874, of which the plaintiffs or their father were cognisant at the time. 21st Novr. 1892.

My learned colleague has given, I consider, a highly satisfactory solution of the problem of the limitation applicable to the Punjab agriculturist who is usually restricted as to the power of alienation, when he outlives his alienation by more than twelve years, as is the case here. The case is the more important as it does not occur elsewhere. The main reasons by which the conclusion arrived at is supported appear to me sound, and have my entire concurrence.

The appeal is accepted, and the plaintiffs' suit is dismissed with costs throughout.

Appeal allowed.

RAM BAKHSH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

MOGA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

No. 2042 of 1888.

(FRIZELLE & BENTON, JJ.)

Claim. Possession of 55 ghumaos 7 kanals of land.

Further appeal from the decree of C. P. Bird, Esquire, Divisional Judge, Umballa, dated 6th August 1888.

Oertel, for appellants.

Golak Nath, for respondents.

FRIZELLE, J.—The first point to be considered is one of limitation, and we think it must be decided against the plaintiffs-respondents. The suit is by the collateral heirs of one Jhagru, who died childless in February 1888, for succession to his estate which is in possession of defendants through a deed of sale executed by Jhagru, dated 7th February 1876. The present suit was brought on 8th March 1888 and defendants plead that it is barred by limitation. There seems to be no doubt that defendants took possession as soon as the deed of sale was executed. 6th Feby. 1890.

No. 142.

AHMAD KHAN,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT BHAGBHARI AND OTHERS.—(DEFENDANTS),—RESPONDENTS.

Case No. 831 of 1891.

(BENTON & RIVAZ, JJ.)

Civil Procedure Code, Section 13, Explanation II—Ground of defence or attack in former suit—Parties litigating under the same title.

The widow of one K. B. sued K. B.'s brother (G. H.) and daughter for her deceased husband's share of the estate for her life, and obtained a decree for half the property. While the above suit was pending, G. H. died, and the present plaintiff, who was K. B.'s son-in-law, was brought on the record (with others) as G. H.'s legal representative, but was not allowed by the Court to put forward any claim of his own as K. B.'s khana-damad in answer to the widow's claim. Subsequently, the said plaintiff sued the widow and daughter of K. B. for K. B.'s estate as his heir and khana-damad.

Plaintiffs' counsel denies this, but the deed recites that possession had been given, and Jhagru himself, in a suit brought by the present plaintiffs in 1882 to have the sale set aside (a suit which was dismissed by the appellate Court as barred by time), admitted that defendants took possession immediately on execution of the deed. When he made this admission he was not siding with the defendants but with plaintiffs. We think this is the best evidence that could be found as to the date of possession and that it would be useless to order further inquiry on this point.

The lower Courts have decided that the present suit is within the period of limitation, on the ground that time only began to run from the death of Jhagru. But we are of opinion that defendants' possession has been adverse since the day they received it, and that Article 144 of the 2nd Schedule of the Limitation Act applies to the case. It is pleaded by plaintiffs' counsel that Article 140 may apply, but we agree with *Punjab Record*, No. 48 of 1885 and No. 155 of 1883, that this Article is not applicable to cases of this kind and that the word "reversioner" therein used is used in the technical sense of a reversioner under English Law. In holding that the period of limitation in the present case runs from the date when defendants obtained possession of the land, we concur with *Punjab Record*, No. 10 of 1890.

We reverse the decrees of both the lower Courts, and dismiss the suit. The parties to pay their own costs in all the Courts, as defendants have only succeeded on a legal point.

Appeal allowed.

Held, that the suit was not barred as *res judicata* under Explanation II, Section 13, Civil Procedure Code, by reason of the previous decision, as the plaintiff was not litigating under the same title in the two suits, and moreover his title to succeed as K. B.'s khana-damad was properly rejected as a ground of defence in the previous litigation.

First appeal from the decree of W. B. DeCourcy, Esquire, District Judge, Jhelum, dated 1st July 1891.

Lal Chand, for appellant.

This was a first appeal from the decree of the District Judge, Jhelum (Mr. W. B. DeCourcy), who had dismissed the plaintiff's suit as barred by the rule of *res judicata*, Explanation II to Section 13, Civil Procedure Code, being the provision of law relied upon.

The facts of the former suit upon which the District Judge came to the conclusion that the rule of *res judicata* applied, sufficiently appear from the judgment of the Chief Court which was delivered by

BENTON, J.—The suit was by a son-in-law to obtain possession of the estate of his father-in-law, Khuda Bakhsh, consisting of landed property, on the ground that he is entitled to succeed as a khana-damad. 8th Novr. 1892.

The defendants are the widow of the deceased, Mussamat Bhagbhari and his daughter Mussamat Hayat Begam, each of whom is registered in the Revenue papers for a half of the estate.

The suit was dismissed by the lower Court on the ground that it was barred as *res judicata* in consequence of a previous suit between the same parties. That suit was finally disposed of by the Divisional Judge, whose judgment, dated 5th July 1890, affirmed the decree of the lower Court in favour of Mussamat Bhagbhari for a one-half share of the estate. The parties to that suit were Mussamat Bhagbhari, widow of the deceased, plaintiff, and Ghulam Hussan, brother, and Mussamat Hayat Begam, daughter of Khuda Bakhsh, defendants. Ghulam Hussan died while the suit was pending, a few days before the suit was decided by the first Court, but the decease not having been brought to the notice of the Court the decree was given against him. The case was remanded to the first Court that Ghulam Hussan's representatives might be substituted, and also that a new guardian *ad litem* might be appointed for Mussamat Hayat Begam, then a minor.

The persons substituted in the first Court were the two widows of Ghulam Hussan, Mussammats Fatteh Bibi and Saidan. An application by the present plaintiff, Ahmad Khan, to be joined as defendant on the ground that he was heir to Ghulam Hussan under a will, was rejected. In the Divisional Court the two widows and the present plaintiff, Ahmad Khan, were allowed to join Mussammat Hayat Bibi as appellants. The present plaintiff, it appears, in a petition dated 4th June 1890, urged his claim to be joined in the suit as being the representative not only of Ghulam Hussan under the will but also as representing Khuda Bakhsh as his khana-damad and successor. We have seen, however, that he was not joined in the suit in the first Court at all. He was joined in the appeal, but not as asserting any title of his own apart from Ghulam Hussan, but solely as his representative. This is clear from the following passage in the Divisional Judge's judgment: "Application was made also on 'behalf of Ahmad Khan that he might be joined as defendant 'and to this the plaintiff (that is Mussammat Bhagbhari) made 'no objection, but his name was not admitted by the Subordinate Judge. All these parties have been joined in this 'appeal, which now stands between the representatives of 'Ghulam Hussan and Mussammat Hayat Begam on the one 'hand, and the plaintiff on the other. The representatives of 'Ghulam Hussan are not entitled to treat the appeal (decree) 'as if it were against them as heirs of Khuda Bakhsh."

Consistently with this view, the case was disposed of by the Divisional Judge on the merits without any inquiry as regards Ahmad Khan's title as direct successor to Khuda Bakhsh, and without any decision in regard to it.

The lower Court, ignoring the fact that the present plaintiff was only placed on the record of the former suit as Ghulam Hussan's representative, insists that in contesting Mussammat Bhagbhari's claim he was compelled not only to avail himself of any defence open to Ghulam Hussan, but also to put forward his own claim as Khuda Bakhsh's son-in-law. Quoting Explanation II to Section 13 of the Civil Procedure Code, it holds that "Any matter which might and ought to have been made 'ground of defence or attack in such former suit shall be 'deemed to have been a matter directly and substantially in 'issue in such suit." The lower Court thus overlooks the words in Section 13 "between the same parties or between parties 'under whom they or any of them claim, *litigating under*

"*the same title.*" Now we have seen that the present plaintiff's title as Khuda Bakhsh's khana-damad was no subject of the previous litigation, because the Courts quite properly would not have it discussed, although the present plaintiff did all in his power to bring it forward.

We must therefore find that Section 13 of the Procedure Code is no bar to the present suit, as the title now put forward was not adjudicated on in the previous suit, and there was no good reason why any decision should be come to regarding it then, as the present plaintiff only figured in that case as Ghulam Hussan's legal representative; and was precluded from availing himself of the direct title which he had himself to succeed.

We accept the appeal, and as the suit has been disposed of on a preliminary point, we remand it for disposal on the merits, under Section 562 of the Procedure Code. The Court fee will be returned and other costs will abide the result.

Appeal allowed: cause remanded.

No. 143.

RURA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

WAZIR SINGH AND ANOTHER,—(PLAINTIFFS),—

RESPONDENTS.

Case No. 100 of 1891.

(BENTON & RIVAZ, JJ.)

} APPELLATE SIDE.

Custom—Succession by collaterals—Pagwand and chundawand—Whole and half blood—Siddhu Barar Jats of Fattehabad tahsil in the Hissar District.

Found, in a suit the parties to which were Siddhu Barar Jats of mauza Badladba in the Fattehabad tahsil of the Hissar District, that the relations of the whole blood excluded those of the half blood in succession to a deceased collateral.

The family land having been divided on the chundawand and not on the pagwand principle, the onus was on the plaintiffs, the half blood relations to establish that they were entitled to share with the defendants, the relations of the whole blood, in the inheritance of the deceased.

Punjab Record, No. 125 of 1884 and No. 4 of 1891, F. B., referred to.

Further appeal from the decree of J. C. Brown, Esquire, Divisional Judge, Ferozepore, dated 10th June 1891.

Lal Chand, for appellants.

Nanak Bakhsh, for respondents.

The plaintiffs, a son and a grandson of a brother of the half blood, claimed to share with the son of a brother of the full blood, the land—163 bigas 3 biswas—left by the deceased, Bela Singh, a sonless proprietor.

The parties were Siddhu Barar Jats of mauza Badladha in the Fattehabad tahsil of the Hissár District.

The pedigree table is given in the judgment of the Chief Court (p. 493).

The first Court (Sardar Charat Singh, Extra Assistant Commissioner), gave the plaintiffs a decree for possession of the half share claimed. It placed the burden of proof upon the defendants to establish that the parties were governed by the chundawand rule because their contention "was in opposition to the general custom."

The Divisional Judge (Colonel H. J. Lawrence) remanded the case for inquiry on the following issues—

- (1). Did Sukh Chain's (the common ancestor) estate go to his heirs *per capita* or *per stripes*?
- (2). What is the custom amongst Siddhu Barar Jats in regard to collateral succession?

The Court of first instance made a general return to the above remand, expressing the opinion that "according to *Punjab Record*, No. 125 of 1884, the distribution in the present "case should be made by the pagwand rule."

The Divisional Judge (Mr. J. C. Brown) affirmed the first Court's decree and dismissed the defendants' appeal. He recorded his reasons thus—

"I am of opinion that in view of the Chief Court rulings "quoted by the lower Court in its original judgment, defendant "cannot be held to have proved any well established custom of "succession *per stripes*, and that therefore the general rule of "succession *per capita* must govern the case. In actual instances quoted, no doubt different rules have occasionally "been followed in the clan to which the parties belong, but, "as stated, no general custom is proved subverting the general "pagwand rule which must therefore be adopted. It is true

Sukh Chain appears to have died some time before the first Settlement, and the information as to what occurred in his time is therefore meagre. It seems, however, to be admitted on all hands that Sukh Chain held the property now found with his descendants. At the first Settlement, we find the whole estate entered as follows —

				Bigas.	Biswas.	
Mehr Singh (plaintiffs' ancestor)...	125	19				pakka.
Sohela	} a joint holding of ...	105	0			,,
Bela Singh						

In the papers of the second Settlement we find plaintiffs' branch recorded as owning 359 bigas 16 biswas (kachha), Rura (defendant) 154 bigas 17 biswas (kachha), and Mussammat Ram Kaur 163 bigas 3 biswas (kachha). Whether the shares as above represented devolved simply by inheritance, or whether Sukh Chain made a partition during his lifetime is not very clear, but there is some evidence to show that a division did take place during the common ancestor's lifetime under which Mehr Singh obtained about the same amount of land as the children of the other wife, and Sukh Chain reserved about 60 bigas (kachha) for his own cultivation. This portion of the land is said to have devolved on Mehr Singh after his father's death (though why it should be so is not clear), and the fact remains that up to the present time Mehr Singh's descendants hold considerably over twice as much land as the defendants' branch of the family. The only explanation offered to account for this, consistently with a pagwand division, is that Mehr Singh must have added to his original holding by breaking up considerable quantities of banjar, but of this there is absolutely no proof, and allowing for the difference between kachha and pakka bigas, each branch of the family appears to have been in possession of (substantially) the same quantities of land from the date of the first Settlement up to the present time. Considering then that it is almost certain that the family land has been divided on the chundawand and not on the pagwand principle, and that originally the descendants of Mussammat Resan held their share jointly as one group, and Mehr Singh's separate holding formed a second group, we think that the onus lies heavily upon the plaintiffs to establish that they have any right to obtain a share of Bela Singh's land in the presence of the defendants. Plaintiffs attempt to discharge this onus by alleging that Siddhu Barar Jats generally follow the pagwand custom, and Civil

Judgment No. 125, *Punjab Record*, 1884, is relied upon in this connection. But even if this contention was made out, it would not avail in the present case to rebut the presumption arising from the actual division which took place in the family of the present parties. Moreover, it is by no means established affirmatively that the pagwand custom universally prevails among the Siddhu Barar Jats of the neighbourhood. In the very precedent cited about twenty instances of chundawand divisions were cited, and two decided cases were quoted in the present case in which Siddhu Jats were held to follow the chundawand custom. If the simple issue in the case was, whether the pagwand or chundawand custom prevailed among Siddhu Barar Jats of the locality, it might be necessary to hold, as was done in Civil Judgment No. 125, *Punjab Record*, 1884, that the general presumption in favour of the pagwand rule had not been rebutted. But in the present case the plaintiffs, to support their claim, have to prove affirmatively the existence of a pagwand custom in this particular family, which they have certainly failed to establish.

We accept this appeal, and decree dismissal of the plaintiffs' suit with costs in all the Courts.

Appeal allowed.

No. 144.

BHAGAT RAM, RUP LAL AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

} APPELLATE SIDE.

TULSI RAM AND ANOTHER,—(DEFENDANTS),—RE-
SPONDENTS.

Case No. 1045 of 1891.

(BENTON & RIVAZ, JJ.)

Indian Limitation Act, 1877, Schedule II, Article 118—Suit to declare an adoption invalid or as having never in fact taken place.

Semle.—The “alleged adoption” mentioned in Schedule II, Article 118, Limitation Act, 1877, must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiff or challenged as being invalid upon some ground of law or custom, which does not go the length of asserting that the adoption, as an adoption, is wholly impossible.

Further appeal from the decree of Lieut. Col. H. J. Lawrence, Divisional Judge, Sialkot, dated 30th July 1891.

Sarbadhicary, for respondents.

The plaintiffs, distant collaterals of one Jamiat Rai, sued for a declaration that a mutation of names in respect of Jamiat Rai's estate effected by his widow in favour of Tulsi Ram, defendant, also a distant collateral, on 10th August 1890, would not affect their rights after the widow's death.

The plaintiffs and Jamiat Rai were agricultural Khattris of tahsil Raya in the Sialkot District.

The defendants (the widow and Tulsi Ram) pleaded that, in accordance with the directions of Jamiat Rai himself, the widow adopted Tulsi Ram seventeen years ago, when he, Tulsi Ram, was two years of age: that the widow had a customary right to adopt, even without her husband's permission: and that the plaintiffs' suit was barred by limitation.

Both the lower Courts concurred in finding that the adoption took place. The grounds for his decision given by the Divisional Judge (Colonel H. J. Lawrence) were as follows—

"As to the factum of the adoption, I find no sufficient reason for differing from the Subordinate Judge, who finds that the adoption was duly effected in the plaintiffs' presence. Although the claim is based on the mutation effected in Tulsi Ram's favour in August 1890, it is so based only on the assumption that, except for the proceedings at mutation, no adoption ever took place. I concur with the Subordinate Judge in holding that it did take place seventeen years before suit with the plaintiffs' knowledge, and the claim is therefore barred by limitation."

The Divisional Judge accordingly dismissed the plaintiffs' appeal. The plaintiffs preferred a further appeal to the Chief Court, the judgment of the Court being delivered by

9th Decr. 1892.

RIVAZ, J.—The plaintiffs, who are the reversionary heirs of one Jamiat Rai, though distantly related, sue for a declaration that an alienation by Mussammat Mahtab Kour, Jamiat Rai's widow, of her husband's estate in favour of Tulsi Ram, who is also a distant collateral, by falsely representing him to be her adopted son and thereby getting mutation of names effected in his favour, will not prejudice their rights after the widow's death. The plaintiffs deny that the widow either in fact adopted Tulsi Ram, or was competent to do so. The defence was that Tulsi Ram was validly adopted seventeen years ago by Mussammat Mahtab Kour, acting under an authority given by her husband shortly before his death: that even without such authority the widow was by custom competent to make the

adoption: that plaintiffs were too distantly related to Jamiat Rai to maintain the suit: and that the claim was barred by limitation. It was also contended that the land in question was not ancestral property, but acquired by Mussammat Mahtab Kour; but as the only ground for this contention was that Mussammat Mahtab Kour, after her husband's death, had been dispossessed of his land by the collaterals, and had been compelled to bring a suit to establish her rights as the deceased's widow, the point need not be further considered, the Divisional Judge's finding that the property must rank as ancestral being undoubtedly correct.

The first Court held every point to be proved in the defendants' favour. It found that seventeen years ago, Mussammat Mahtab Kour, acting under the permission of her husband granted on his death-bed twenty years previously (for it is admitted that Jamiat Rai died thirty-seven years before suit) had adopted Tulsi Ram, who was two years old at the time, in the presence of the brotherhood: that he had lived with her ever since, and been married from her house: that such an adoption was valid by custom, and would be equally valid, even if no authority to adopt had been obtained from the husband. Some stress was laid by the first Court upon the number of degrees which the plaintiffs were removed from the common ancestor, though it was conceded that Tulsi Ram was as distantly related, and finally it was held that the suit was barred by limitation.

The Divisional Judge was of opinion that the alleged permission to adopt was not sufficiently proved, and here we have no hesitation in agreeing with him. The evidence in support of this part of the case is that of two witnesses, who appear to be the widow's tenants, and do not belong to the parties' caste, and whose testimony is not only in itself unconvincing, but is further discredited by the delay of twenty years before the widow took advantage of the permission alleged to have been accorded to her at her own earnest request. The Divisional Judge, however, concurred with the finding of the first Court that an adoption did take place by the widow seventeen years before suit, at which the plaintiffs were present, and that therefore the claim was barred by limitation. The Divisional Judge considered it unnecessary to determine whether by the custom of the parties (agricultural Khatri of the Sialkot District) a widow could adopt on her own account, so as to transfer the inheritance of her husband's

estate to the adopted son, in regard to which point he noted there had been no sufficient inquiry. Lastly, the Divisional Judge expressed an opinion in favour of the competency of the plaintiffs to maintain the suit.

It is difficult, I think, to see how upon the above findings the Divisional Judge was justified in holding that the suit was barred by limitation. Though no provision of the Limitation Act is quoted, the Divisional Judge presumably held the suit barred under Article 118 of the 2nd Schedule. But in my opinion before that Article could be held applicable, a finding was necessary as to the power of the widow to adopt an heir to her husband on her own account, and without his express permission. I do not consider that the Article can be construed as necessarily applicable to a case where a person whom neither law nor custom permits to make an adoption, chooses to go through the form of appointing an heir, which ceremony she is pleased to call an adoption, or can be successfully pleaded, when, after her conduct has been ignored for several years as too obviously without effect to call for any remonstrance, she then takes some more effective steps to alienate the property in favour of her so called adopted son, whereupon a suit for a declaratory decree is brought. I think the alleged adoption mentioned in Article 118 must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiffs, or challenged as invalid upon some ground of law or custom which does not go to the length of asserting that the adoption, as an adoption, is wholly impossible. Such an adoption would, I should say, certainly not bar a suit for possession by the heirs brought within twelve years of the widow's death—*vide Raj Bahadoor Singh v. Achumbit Lal* (L. R., 6 Ind. App., 110). The above question need not, however, be finally decided in the present case, for, after a consideration of the evidence adduced by the defendants to establish the factum of the alleged adoption, I find myself unable to agree that any adoption has been sufficiently made out. The first Court appears to have accepted without question all the oral evidence produced by the defendants, including that as to the alleged permission to adopt. The witnesses as to the actual adoption are certainly more numerous than those to the granting of the authority to adopt, but I do not find their testimony any more convincing. My opinion is, after a consideration of the evidence on both sides, that the more probable

story is that the ceremony in the presence of the brotherhood seventeen years before suit is a mere fiction : that probably Mussamat Mahtab Kour did take Tulsi Ram into her house some years before suit, though this may have been, as distinctly deposed by the plaintiffs and their witnesses, owing to the widow's friendly relations with Barkat Ram, Tulsi Ram's natural father. Anyhow, no serious attempt to put forward Tulsi Ram as an heir was made till the mutation proceedings of 1890, and therefore the present suit is certainly not barred by time. Further, I consider that on the above findings, and agreeing with the Divisional Judge that the plaintiffs have not been shown to have no *locus standi* in the present case, the suit should succeed upon the merits.

As to the widow's power to adopt an heir to her husband from among the collaterals without his authority, the record is certainly inconclusive, though the *Rivaj-i-am* is in defendants' favour, but I should not be able to accept the custom therein stated as correct without further inquiry. I do not, however, consider that such inquiry need be ordered in the present case. The defendants have failed to prove the adoption set up. No subsequent adoption has been pleaded or proved, and no attempt has been made to contend that the widow could alienate, at her own will and pleasure, the ancestral property of her husband to one of the collaterals in the presence of others equally related. The plaintiffs are therefore, I think, entitled to a decree that the widow's attempt to transfer the land to the defendant Tulsi Ram as her adopted son will not affect their interests as the collateral heirs of Jamiat Rai, and I would accept this appeal and decree in the above terms, giving plaintiffs their costs throughout.

BENTON, J.,—I concur.

Appeal allowed.

No. 145.

BAKHU,—(DEFENDANT),—APPELLANT,

Versus

JHANDA & OTHERS,—(PLAINTIFFS),—RESPONDENTS.

APPELLATE SIDE.

Case No. 373 of 1891.

(BENTON & RIVAZ, JJ.)

Suits Valuation Act, 1887—Rules under—Suit to declare an alienation of land to be not binding after grantor's death—Further appeal—Value of suit Rs. 1,000 or upwards—Punjab Courts Act, 1884, Section 30.

The plaintiffs sued for a declaratory decree that an alienation by a childless proprietor would not affect their reversionary interests in the

land, the subject of the alienation : the grantor was alive and no consequential relief was prayed for.

The alienation challenged by the plaintiffs purported to be for Rs. 1,300 the value of the land calculated at 30 times the revenue was Rs. 770.

Held, that no further appeal to the Chief Court was competent in the absence of an application to the Divisional Judge for a certificate under Section 40, sub-section (1) (a), Punjab Courts Act, 1884, the value of the suit for purposes of jurisdiction being less than Rs. 1,000 and both Courts having concurred in decreeing the claim.

The suit as brought, though it fell within the description of claim mentioned in No. II of the Rules issued under Part II of the Suits Valuation Act, was subject to the proviso to that Rule, and as the subject of the alienation impugned was land as specified in Section 3 of the Act, and was valued for purposes of jurisdiction at 30 times the revenue, or Rs. 770, according to the rules made under that Section, it followed from Section 4 of the same Act that the value of the present claim could not be held to be in excess of that sum.

Held, also, that the lower appellate Court's decree could not be said to involve directly some claim to, or question respecting, property of Rs. 1,000 or upwards in value within the meaning of Section 40, sub-section (1) (a) of the Courts Act.

Further appeal from the decree of M. Macauliffe, Esquire, Divisional Judge, Sialkot, dated 10th February 1891.

Lal Chand. for appellant.

On the 28th November 1884, Satar, defendant 2, a sonless proprietor, effected a sale of his land to Bakhu, defendant 1, a near relation, for Rs. 1,300. The plaintiffs, sons of brothers of Satar, sued as next collaterals for a declaration (plaint stamped Rs. 10-0-0) that the sale was fictitious; that no money had passed; and that the alleged sale was effected solely to deprive the plaintiffs of their rights as Satar's heirs.

The parties are Bhatti Rajputs of tahsil Hafizabad in the Gujranwala District.

Both the lower Courts concurred in decreeing that the sale would be void as against the plaintiffs on Satar's death.

Bakhu, the alleged purchaser, preferred a further appeal to the Chief Court. A preliminary question arose whether a further appeal was admissible without a certificate under Section 40, sub-section (1) (d), Punjab Courts Act, and also whether the decree involved directly some claim to, or question respecting, property of like value (sub-section (1) (a)).

The judgment of the Chief Court disposing of these points was delivered by

RIVAZ, J.—The preliminary question in this appeal is 9th Novr. 1892.
whether a further appeal lies to this Court under Section 40
sub-section (1) (a) of the Punjab Courts Act.

The suit is one for a declaratory decree that an alienation by a childless proprietor shall not affect the plaintiffs' reversionary interests in the land which forms the subject of the alienation. No consequential relief is prayed for, and the suit is therefore one of those mentioned in Article 17 of the 2nd Schedule of the Court Fees Act, 1870, viz., in clause (iii) of that Article. The alienation challenged by the claim purports to be for Rs. 1,300, but the value of the land calculated at thirty times the revenue under Rule I (b) of the Rules made under Part I of the Suits Valuation Act (contained in Punjab Government Notification No. 255, dated 4th March 1889) is Rs. 770, or less than Rs. 1,000. The two lower Courts have concurred in decreeing the claim, and no certificate has been applied for in, or obtained from, the Divisional Court.

The contention of the appellant's pleader at the first hearing was that the value of the suit for purposes of jurisdiction was Rs. 1,300 and No. II of the Rules framed under Part II of the Suits Valuation Act (*vide* Chief Court's Book Circular No. V of 1889*) was relied upon in support of this contention. Subsequently, it was suggested that even if the value of the suit was found to be less than Rs. 1,000, a further appeal was nevertheless admissible under Section 40 (a) of the Courts Act, as the decree involved directly a question respecting property of more than Rs. 1,000 in value, viz., the sum of Rs. 1,300 alleged to have been paid by the defendant alienee, which was at stake in the case. Each of the above contentions has now to be disposed of.

We are of opinion, on the above statement, that the value of the suit, by which is meant the value of the subject matter of the suit, is less than Rs. 1,000. The suit as brought comes within the description of claim mentioned in No. II of the Rules issued under Part II of the Suits Valuation Act, and but for the proviso to that rule, might be valued at Rs. 1,300, the amount of the consideration for which the alienation purported to have been made. But Rule II is subject to the provisions of Part I of the Suits Valuation Act, and the Rules in force under the said Part, so far as those provisions are applicable. Now the subject of the alienation in contest in the present case is land, as specified in Section 3 of the

*Punjab Record, 1889, Chief Court Circular Orders, p. 20.

Snits Valuation Act, and under the Rules made under that Section, is to be valued for purposes of jurisdiction at thirty times the revenue, or Rs. 770. Under Section 4 of the same Act, the suit being one mentioned in Schedule II, Article 17 of the Court Fees Act and relating to land, the value of which has been determined by Rules under the preceding section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued, shall not exceed the value of the land as determined by those rules, in this case Rs. 770. We cannot, therefore, entertain (without a certificate) a further appeal in the present case, on the ground that the value of the suit is Rs. 1,000 or upwards, within the meaning of Section 40 (1) (a) of the Punjab Courts Act, and the first contention must be held to fail.

The next point is whether the decree can be said to involve directly some claim to, or question respecting, property of the value of Rs. 1,000 or upwards, within the provision in the latter part of clause (a) to Section 40. In our opinion this is not so. The only property respecting which any claim or question is *directly* involved in the present decree is, we think, the land, the value of which has already been shown to be less than Rs. 1,000. Any claim to, or question respecting, the sum of Rs. 1,300 alleged to have been paid to the childless proprietor by the alienee defendant is, at most, *indirectly* involved in the decree. We think that the Legislature must be taken to have intentionally limited the operation of the second portion of clause (a) of Section 40 of the Courts Act to cases where the decree *directly* involved the higher value. The language of the Section is significantly different from a similar provision in Section 596 of the Code of Civil Procedure, relating to the value of the subject matter of appeals to the Queen in Council, the latter section providing for an appeal if the decree involves, *directly or indirectly*, some claim or question to, or respecting, property of the value of Rs. 10,000 or upwards. The language of this portion of clause (a) of Section 40 of the Courts Act has been considered in at least two published decisions of this Court. Civil Judgment No. 94, *Punjab Record*, 1890, is an illustration of a decree held to fall within the clause under consideration, while in Civil Judgment No. 169, *Punjab Record*, 1888, where the question which arose was not altogether dissimilar to the question in the present case, the Court held that the decree could not properly be said to involve directly a question respecting property exceeding the value of the suit.

In our opinion, an appeal in the present case is inadmissible in the absence of a certificate from the Divisional Judge, and on that ground alone we refuse to entertain the appeal before us.

We leave each party to pay his own costs in this Court.

Appeal dismissed.

CRIMINAL JUDGMENTS,
1892.

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

ABDUL AZIZ,—PETITIONER,

Versus

THE MUNICIPAL COMMITTEE, BAHADARGARH,
DISTRICT ROHTAK—RESPONDENT.

} REVISION SIDE.

Case No. 16 of 1892

(FLOWDEN & STODDON, JJ.)

Punjab Municipal Act, 1891, Section 186—Authority for prosecutions under the Act—Criminal Procedure Code—Complaint.

Section 186, Punjab Municipal Act, 1891, provides that—

No Court shall take cognizance of any offence punishable under this Act or any rule or bye-law except on the complaint of the Committee or of some person authorized by the Committee in his behalf.

A document was addressed to the Deputy Commissioner, Rohtak, by the Municipal Committee of Bahadargarh requesting that, in accordance with the Committee's proceedings of 2nd May 1892, a second prosecution might be instituted against Abdul Aziz under Section 169 of the Municipal Act, 1891.

The Deputy Commissioner by an order, dated 23rd May 1892, ordered that "a case be instituted and be made over to the Tahsildar of Sampla."

Held, with reference to the provisions of Sections 4 (a) and 191, Criminal Procedure Code, that no "complaint" had been made of which the Magistrate could take cognizance.

Petition for transfer of a Criminal case from the Rohtak to the Delhi District.

Lajpat Rai, for petitioner.

Ganpat Rai, for respondent.

The accused applied to the Chief Court for transfer of a criminal complaint filed against him by the Municipal Committee of Bahadargarh.

The Chief Court dealt with the case on the Revision Side, holding that there was no complaint of which the Magistrate could take cognizance.

The judgment of the Chief Court was delivered by
 11th Augt. 1892. PLOWDEN, J.—This is an application to remove a criminal case from the Court of the Tahsildar-Magistrate of Sampla to another district.

The case is described as one between the Municipal Committee of Bahadargarh and Abdul Aziz as the accused, and is said to be a prosecution for an offence under the Punjab Municipal Act, 1891.

By Section 186 of the Act "No Court shall take cognizance of any offence punishable under it except on the complaint of the Committee or of some person authorized by the Committee in this behalf."

We cannot find any complaint in this case.

An order for the case to be registered and summons issued was made by the Tahsildar-Magistrate on May 25th, 1892. It is endorsed upon a document which commences with a proceeding of the Municipal Committee of Bahadargarh, dated May 21st, 1892. This proceeding, after a recital, was a request to the Deputy Commissioner of Rohtak that, in accordance with the Committee's proceedings of May 2nd, 1892, a second prosecution may be instituted against Abdul Aziz, Rissaldar, under Section 169 of Act XX of 1891. On this is an order of the Deputy Commissioner, dated May 23rd, 1892, that "a case (moquadamma) be instituted and be made over to the Tahsildar of Sampla."

On receipt of "this order," as the Tahsildar-Magistrate describes it, he passed the order of May 25th above mentioned.

There is a general definition of complaint in Section 4 (a) of the Code of Criminal Procedure, and Section 191, in a Chapter dealing with the jurisdiction of the Criminal Courts, provides for a Magistrate taking "cognizance of any offence, upon receiving a complaint of facts which constitute such offence."

No latitude of interpretation can convert either the proceeding of the Committee, dated May 21st, or of the Deputy Commissioner, dated May 23rd, into an allegation made in writing to a Magistrate, with a view to his taking notice under the Criminal Procedure Code of facts which constitute

an offence under the Punjab Municipal Act. The Tahsildar-Magistrate has virtually issued his summons upon information received through these papers that the offence has been committed, which is an entirely different thing from taking cognizance of an offence upon complaint.

We are of opinion that the proper order is to quash the proceedings, by setting aside the order for the issue of a summons which was made without any complaint being before the Magistrate. This will leave the Committee at liberty to present, if so advised, a proper complaint. When that has been presented, the Magistrate should be in a position, if he issues a summons, to insert in it intimation of the nature of the offence charged and not merely call upon the accused to answer a charge under Section 169 of the Punjab Municipal Act.

The order of the Magistrate, dated May 25th, 1892, directing a summons to issue, is set aside, and no further proceedings will be taken on the document upon which the order was made.

Proceedings set aside.

No. 2.

ABDUL GHANI,—(ACCUSED),—PETITIONER,

Versus

THE MUNICIPAL COMMITTEE,
PESHAWAR,—RESPONDENT.

Case No. 1244 of 1892.

(PLOWDEN, J.)

Punjab Municipal Act, 1891, Section 186—Authority for prosecution—Criminal Procedure Code—Complaint.

The Secretary, Municipal Committee, Peshawar, wrote an informal letter to a second class Magistrate making certain suggestions as to proceedings against the accused under the Municipal Act, 1891, and the verbal authorization of the Deputy Commissioner (who was also apparently President of the Committee) was afterwards relied on.

The Secretary of the Committee was not examined on oath with reference to the contents of his letter.

Held, that there was no complaint by the Municipal Committee or by some person authorized by the Committee in that behalf of which a competent Magistrate could take cognizance—Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code.

} REVISION SIDE.

Petition for revision of the order of Captain E. Inglis, District Magistrate, Peshawar, dated 23rd July 1892, upholding the order of B. Donald Esquire, 2nd Class Magistrate.

The Secretary, Municipal Committee, Peshawar, wrote an informal letter to a second class Magistrate making certain suggestions regarding proceedings being taken against the accused under the Municipal Act, 1891. The Secretary was not examined by the Magistrate in the manner directed by the Code of Criminal Procedure, nor was any written authority given to the Secretary to make a complaint. The accused by his pleader objected to the Magistrate taking proceedings against him, but the objection was overruled and he was convicted by the Magistrate, and his appeal to the District Magistrate was dismissed. The accused then moved the Chief Court on the revision side.

The judgment of the Court was delivered by

9th Sept. 1892.

FLOWDEN, J.—The objection taken by the pleader for the accused to the Magistrate taking cognizance of this case against the accused, was a perfectly valid one.

The prosecution is for an offence under Section 95 of Act XX of 1891, and purports to be by the Municipal Committee of Peshawar. As I understand the declaration made before the Magistrate and his order, the letter in the file purporting to be signed by Mr. Quilter is held to be the complaint, and both Mr. Quilter and the Magistrate had spoken to the Deputy Commissioner about the matter, and the Deputy Commissioner, or rather "Mr. Merk," had ordered the Magistrate to try the case.

The Magistrate appears not to have read or not to have understood Section 186 of Act XX of 1891. By that section no Court can take cognizance of any offence punishable under this Act or any rule or bye-law except on the complaint of the Committee or of some person authorized by the Committee in this behalf.

Assuming Mr. Quilter's letter to be a complaint, it is not a complaint of the Committee.

Then is it a complaint of some person authorized by the Committee in this behalf? The authority, by the explanation to Section 186, must in all cases be in writing. There is no written authority. The authority put forward is a verbal authority by the Deputy Commissioner. Now it may be, that the Deputy Commissioner is also the President of the Com-

mittee, but he is certainly not the Committee. The authority given by Mr. Merk (I suppose the Magistrate means by the District Magistrate), to the Magistrate to try the case has no bearing on the question whether the offence charged is cognizable by a Criminal Court.

Then, as to the letter called a complaint, it is impossible to believe that, at the time it was written by Mr. Quilter, it was intended to be a complaint, or that at the time it was received by the Magistrate, it was received by him as a complaint. It does not fulfil the requisites of a complaint as defined in the Criminal Procedure Code, and the writer was not examined upon it as a complainant, as he ought to have been, if the writing was received as a complaint and regarded as such by the Magistrate. It commences "My dear Donald:" it concludes, after making certain suggestions, "What say you? Yours truly, J. H. Quilter," and is addressed to "R. Donald, Esquire." A Magistrate who is prepared to receive a document such as this as a complaint must have somewhat peculiar notions of the dignity of his Court and of the office of Magistrate. The document might be regarded, notwithstanding its objectionable form, as being "information received from a person other than a Police Officer," but this is carefully distinguished in Section 191 of the Criminal Procedure Code from a complaint, and a complaint was essential under Section 186 of the Municipal Act.

The whole of the proceedings taken by the Magistrate upon this document are bad for want of a proper complaint, such as is required by Section 186; and the conviction and sentence are, therefore, set aside and the fine if levied will be refunded.

This order will not of course be any bar to a prosecution properly instituted by the Municipal Committee, or by some person duly authorized by the Committee in this behalf, upon the same facts.

Application allowed : conviction quashed.

REVISION SIDE. }

No. 3,

NUR DIN;—ACCUSED,

Versus

THE MUNICIPAL COMMITTEE, LAHORE,—
RESPONDENT.

Case No. 1368 of 1892.

(PLOWDEN, J.)

*Punjab Municipal Act, 1891, Section 186—Authority for prosecution—
Complaint—Criminal Procedure Code.*

A complaint was filed entitled as follows—"The Municipal Committee through Mr. Webb, Inspector of Sanitation, complainant," against Nur Din.

At the foot was written in Urdu "Petition of Mr. Webb, Inspector of Sanitation, Civil Station, Lahore": below this was an English signature "D. Johnston" which appeared to be the signature of the Secretary of the Committee.

Held, that this was not a complaint made in accordance with law (Section 186, Municipal Act, 1891, and Sections 4 (a) and 191, Criminal Procedure Code) and that the Magistrate's proceedings must be set aside.

Case reported by Colonel O. H. T. Marshall, Sessions Judge, Lahore, by order dated 26th August 1892.

The order of reference made by the Sessions Judge in connection with the conviction of the accused of an offence under Section 164, Punjab Municipal Act, 1891, was as follows:—

The accused had piled his bricks in the form of a wall near the Mochi Gate, Lahore, level with an ancient encroachment of Chota Lal.

This the Municipal Committee said was an encroachment on the public road without the sanction of the Committee, but the accused urged that he piled the bricks on his own land, and was not guilty of any encroachment.

The accused, on conviction by Mr. A. J. Harrison, exercising the powers of a Magistrate of the first class in the Lahore District, was sentenced by order dated 26th July 1892, under Section 164 of Municipal Act, XX of 1891, to pay a fine of Rs. 10, or in default to undergo a week's simple imprisonment.

The proceedings are forwarded for revision on the following grounds:—

It appears that the case for revision has been made out. It has been decided without proper inquiry, and important

facts have been overlooked. It has not been proved that the accused built a wall on municipal land ; the bricks were placed where they were found, stored for house building. The Magistrate appears to have taken no note of the Darogah's report. There is a sale deed which shows the purchase of the land in question. This fact has not been looked into. The reports show that accused rents the land coloured fawn from the Committee, and might therefore store his bricks there. No offence of encroachment having been proved against the accused, the case is submitted on the Revision side for the orders of the learned Judges of the Chief Court.

The following judgment was delivered by

LOWDEN, J.—Notice of this application for revision has been issued to the President of the Municipal Committee, and acknowledged by the Secretary, but no one is present. 18th Octr. 1892.

This is an application to revise on the merits a conviction by a Magistrate of the Lahore District of an offence under Section 164 of the Punjab Municipal Act of 1891; but the proceedings appear to be bad *ab initio*, apart from the merits of the conviction.

The complaint is entitled: "The Municipal Committee through Mr. Webb, Inspector of Sanitation, complainant," against Nur Din. At foot is written in Urdu: "Petition of Mr. Webb, Inspector of Sanitation, Civil Station Lahore;" below this is an English signature "D. Johnston," which I presume is the signature of the Secretary of the Municipal Committee, who has acknowledged the notice of this proceeding, and with whose signature I happen to be acquainted.

According to the endorsement on the complaint, Mr. Webb was examined on oath, in support of the complaint, and the record of his statement bears a signature "H. J. Webb." Below this, the Magistrate's order is that a summons issue for June 22nd, and that the Inspector is to file process fees.

Now Section 186 of the Punjab Municipal Act enacts that "No Court shall take cognizance of any offence punishable under this Act except on the complaint (1) of the Committee or (2) of some person authorized by the Committee in this behalf."

It is impossible to regard this complaint as the complaint of the Committee, merely because it is entitled with the name of "The Municipal Committee, through Mr. Webb." Then

the question is whether it was the complaint of some person authorized by the Committee in this behalf.

I certainly cannot regard this as the complaint of any person but Mr. Webb. Assuming that the English signature at foot of the complaint is that of Mr. Johnston, as Secretary of the Committee, which it does not purport to be, I cannot regard the complaint as one by the Secretary. At most, this signature could be regarded as a countersignature by Mr. Johnston, as Secretary, of the complaint of Mr. Webb.

Then does it appear that Mr. Webb was authorized by the Committee to make the complaint? According to the explanation to Section 186, authority to prosecute in all cases, except that of the President, Vice-President and Secretary—and Mr. Webb holds none of these offices—must be personal, and in writing.

The Magistrate took cognizance of the case when he issued the summons, and he did this although nothing purporting or alleged to be a written authority from the Committee to Mr. Webb to prosecute was before him, and this deficiency was not supplied subsequently. Supposing for a moment that the signature of Mr. Johnston could be viewed as written authority from the Secretary to Mr. Webb to prosecute, authority from the Secretary is not authority from the Committee, and it is authority from the Committee that is requisite under the section.

The Magistrate having taken cognizance of the offence complained of in contravention of Section 186 of the Act, his proceedings are liable to be set aside on this ground alone. I may add that there are also other sufficient grounds for questioning the conviction. The question of fact in the case was, whether accused deposited building materials in a street without the permission of the Committee, his defence being that the place of deposit was not in a street but private property. Two maps were filed, one in favour of the Committee, the other of the accused: neither of these was proved, and there is no evidence that the place of deposit was in a street, except the assertion of Mr. Webb. Without further inquiry the conviction could not be maintained.

I set aside the conviction and sentence of the Magistrate, and in their stead order that the complaint be dismissed on the ground that it does not appear that Mr. Webb was authorized by the Committee to institute it.

Application allowed: conviction quashed.

No. 4.

AWAL KHAN,—(ACCUSED),—APPELLANT,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} APPELLATE SIDE.

Case No. 314 of 1892.

(PLOWDEN & STODDON, JJ.)

Criminal Procedure Code, Section 540—Power to summon material witness.

Section 540, Criminal Procedure Code, does not authorize a Sessions Judge to summon witnesses after the trial has been concluded, so far that no witnesses remain to be examined for either side and the assessors have given their opinion.

Appeal from an order of conviction passed by W. O. Clark Esquire, Sessions Judge, Peshawar, dated 17th June 1892.

Turner, for appellant.

The appellant was convicted at a Sessions trial of an offence punishable under Section 302, Indian Penal Code, and was sentenced to death. He appealed to the Chief Court against the conviction and sentence.

The judgment of the Chief Court after dealing with the question whether the murder of one Sarwar was committed by the accused, proceeded as follows —

* * * * *

PLOWDEN, J.—We should however refer to the irregular 11th Augt. 1892.
proceedings in the Court of Session. After the trial had been concluded, so far, that no witnesses remained to be examined for either side, and after the assessors had given their opinion on 6th June, the Sessions Judge was disposed to agree with them, but not to give judgment without further inquiring into the grounds of an opinion which the Committing Magistrate had recorded in writing *before* commitment, that the accused was really innocent and the murder had been committed by another man and his accomplice. He accordingly sent the case to the Magistrate for this purpose and to send up any witnesses whom it might be proper to examine under Section 540, Criminal Procedure Code.

That section does not empower a court to fish for witnesses or warrant an order for further inquiry to be made by a committing Magistrate after a trial has commenced in the the Court of Session ; and the examination of witnesses under that section ought undoubtedly to be made in presence of

assessors, when the trial is with assessors, and before their opinion is taken. The proper course in view of the Magistrate's recorded opinion would have been for the Sessions Judge, on receiving the commitment, to point out to the Magistrate that until the trial commenced he could summon and examine any supplementary witness who could give relevant evidence, and bind them over under Section 219, Criminal Procedure Code, to appear at the trial.

It appears, however, that the Sessions Judge examined no more witnesses and the accused has not been prejudiced by what occurred. In fact, it is clear that the Sessions Judge acted in his interest in directing further inquiry, on the chance of something being disclosed to shake his own adverse opinion formed on the evidence given at the trial. No reliance was placed in the argument before us on the evidence collected by the Magistrate, and no further examination of witnesses seems to us to be necessary after a perusal of his second record.

We are accordingly of opinion that the conviction under Section 302, Indian Penal Code, should be maintained.

* * * * *

Appeal dismissed and sentence of death confirmed.

No. 5.

YAGHI,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1118 of 1892.

(PLOWDEN, J.)

REVISION SIDE. {

Criminal Procedure Code, Section 110—Security for good behaviour from habitual offenders.

The District Magistrate found that the accused was a bad character and earning his living through prostituting one of his wives.

Held, that this was not a ground for demanding security from the accused under Section 110, Criminal Procedure Code.

The law enabling security to be taken from a person who is proved to be by common report a habitual thief is no doubt a salutary law, but it is a hard law that can be used for oppressive purposes, unless the Magistrates who are called upon to apply it exercise their judicial discretion in a judicious manner.

Petition for revision of the order of Captain E. Inglis, District Magistrate, Peshawar, dated 2nd June 1892, passed on appeal.

The accused was required by an order made by Mr. H. A. Casson, Magistrate, 1st class, to execute a bond for Rs. 100, with one surety for the same amount, to be of good behaviour for two years, or, in default, to suffer rigorous imprisonment for a like period.

The accused appealed to the District Magistrate, who dismissed the appeal.

The accused then applied to the Chief Court on the Revision Side. The judgment of the Court was delivered as follows—

FLOWDEN, J.—The orders in this case must be set aside. 25th Aug. 1892.

The first Court had “no difficulty in believing the Police evidence that the accused is a thief and a gambler.” Of two witnesses, both policemen, one had said that by common report accused was a *choripesha* and gambler, and had no other means of livelihood. The other according to the vernacular record did not say that he was a thief. There is evidence, which both Courts believe, that the accused is living on the proceeds of his wife’s prostitution.

The District Magistrate on accused’s appeal (accused treating the Magistrate’s order of April 13th, 1892, as final, which he was entitled to do seeing that security was taken from him on May 4th) found that the evidence showed clearly that the accused was a bad character and earning his living through prostituting one of his wives. This is not ground for demanding security under Section 110.

As a matter of fact the accused is a Kanjar: he has been thrice previously put on security, once in 1880, once in 1881, under Section 505 of the old Criminal Procedure Code, and once in 1887 under the new Code for a year. He has never been convicted of any offence; and if there was a case pending against him for picking a pocket at the date of these proceedings, which he denies here as he did in his appeal to the District Magistrate, it has broken down.

The law enabling security to be taken from a person who is proved to be by common report a habitual thief is no doubt a salutary law, but it is a hard law that can be used for oppressive purposes unless the Magistrates, who are called upon to apply it, exercise their judicial discretion in a judicious man-

ner. It certainly cannot be said that either Magistrate has done this in the present instance, and neither has found facts which bring the accused within the law.

The orders of the lower Courts are set aside and the security bond will be cancelled.

Application allowed : order for security cancelled.

No. 6.

REVISION SIDE. {

THOMAS HOPPER,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1042 of 1892.

(PLOWDEN & STODDON, JJ.)

Indian Penal Code, Sections 447, 509—Criminal trespass—Intrusion on privacy, intending to insult modesty of a woman.

To constitute intrusion upon the privacy of a woman an offence under Section 509, Indian Penal Code, the intruder must be intending to insult the modesty of such woman. The opening words of the section relate to and qualify each one of the acts subsequently mentioned in it as constituting an element in the offence there defined.

The facts found by the Magistrate were that the accused was on prosecutor's premises with intent to peep or endeavour to peep into the apartments occupied by the ladies of the household.

Quære. Whether these findings justified a conviction of the offence of intruding upon the privacy of a woman, whereby to insult her modesty.

Found, on the evidence, that it was not proved that the accused was on the premises with any intent that constituted his presence there criminal trespass.

Petition for revision of the order of J. B. Rowe, Esquire, Magistrate, 1st class, and a Justice of the Peace, Simla, dated 1st July 1892.

The points for consideration, and the questions of law in connection therewith, appear from the judgment of the Chief Court, which was delivered by

9th Sept. 1892.

PLOWDEN, J. (STODDON, J., concurring).—The accused, an European British subject, was convicted and sentenced to fine by a Magistrate of the first class and a Justice of the Peace at Simla, on July 1st. On the 9th July he presented an application to this Court for the purpose of having the conviction set aside, which is, in form an application for revision, and in substance an appeal, to which he is by law

entitled (Criminal Procedure Code, Section 408, proviso (b), Section 415 and Section 416). Notice was issued to the District Magistrate for hearing on August 20th, and on that day the accused appeared in person and was heard in support of the application, of which the further consideration was adjourned to the next sitting of a Bench.

There were two sets of charges against the accused, one relating to the 14th, the other to the 15th, June. The first set was of alternative charges, under Section 509, or Section $\frac{509}{11}$, or Section 447, Indian Penal Code, in that the accused intruded or attempted to intrude on the privacy of certain female residents of premises occupied by the prosecutor, or, "entered "on the said premises with intent to commit or attempt to "commit the offence above described, that is, intrusion on the "privacy of the ladies referred to" (see second charge sheet).

The second set of charges was with two heads, the first under Section 447 and the second under Section $\frac{509}{11}$, Indian Penal Code, similar to the corresponding charges in the first set.

The finding of the Magistrate was, that the accused had either committed the offence of intruding on the privacy of a female or females, or attempted to do so, or committed criminal trespass, and had thereby committed one or other of the offences punishable under Section 509, or $\frac{509}{11}$, or 447, Indian Penal Code, on both counts of the charges for 14th and 15th June 1892; and the sentence was a single one, a fine of Rs. 50.

It is to be observed that in none of the counts under Section 509, Indian Penal Code, is any intent alleged, and in the counts under Section 447 the intent alleged is simply "to intrude upon the privacy of female residents." The contents of these counts taken with the judgment, to be mentioned presently, suggest the inference that it was overlooked by the prosecution and the Court, that to constitute intrusion upon the privacy of a woman an offence under Section 509, the intruder must be "intending to insult the modesty of such "woman." It is clear, however, that the opening words of the section relates to and qualifies each one of the acts subsequently mentioned in it as constituting an element in the offence there defined.

Referring again to the charges, it was an admitted fact that the accused was on the premises of the prosecutor, on the night of the 14th and of the 15th, and the principal question

before the Magistrate was the intent with which he was there. The finding as to the 14th appears to be this: "Accused's object was to peep into the private apartments (on the upper floor) of the young ladies in the house, whether through the glass panes of the bed-room or the newly made holes in the bath-room doors": and as to the 15th, that "his intent was a bad one and most probably the same as that above described in regard to his visit of the previous night, viz., to endeavour to look into the private apartments of the young ladies staying downstairs, and may be to bore holes there also if an opportunity offered." In a long order of June 30th, preliminary to the drawing up of charges, the Magistrate remarks "I apprehend that a person trespassing into this (the upper) or the lower verandah, which also abuts on a bath and bed-rooms occupied by young ladies, with the object of peeping in, may validly be held to 'intrude upon the privacy' of the occupants of the room and that the commission of this offence does not necessitate actual entry into the rooms themselves." Here again "intention to insult the modesty of a woman" is not alluded to.

Virtually, the conviction rests upon the ground that the accused on each night intended to peep, or endeavoured to peep into the apartments occupied by ladies of the household, and it is unnecessary to determine whether being on the premises with this intent amounts to an offence, until it has been determined whether this was in fact the intent with which the accused was there.

After discussing the evidence the judgment concludes thus—

The right conclusion upon the whole evidence, as it appears to me, is that it is not proved either that the accused entered or remained in the upper verandah on the 14th with the intent imputed to him by the Magistrate, or with any other intent constituting his presence there criminal trespass, while it is equally not proved that he was there with the intent he asserts or with some other innocent intent. The intent is in short not proved at all. Not a single fact is proved which is not consistent with his innocence of the offence imputed to him, and I consider that he is entitled to be acquitted in respect of the charges relating to the 14th June.

The same opinion extends to the charges in relation to the night of the 15th. All that is proved as to that night is that the accused entered the compound, passed over the ground

between the lower verandah and the hill side, and was passing out of the compound towards the road to Bishop Cotton's School when the bearer stopped him. The evidence of the jhampani purports to refer to this night ; but it is of no value, as he does not profess to identify the accused and it relates to a person in the upper verandah. It is mere conjecture that the accused was in the compound that evening for the purpose found by the Magistrate. If it were proved that he had been for a similar purpose in the upper verandah on the previous night, the conjecture would have a firmer foundation. As it is, the conviction in respect of the 15th also seems to be unsustainable and should be, in my opinion, reversed.

The question which I have indicated above as to whether the facts found by the Magistrate justified the convictions consequently does not arise for decision.

Application allowed : conviction quashed.

No. 7.

MAHA NAND,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Case No. 1066 of 1892.

(PLOWDEN J.)

Hackney Carriage Act, 1879, Sections 6 and 7—Driving an unlicensed carriage.

To drive an unlicensed carriage is not a breach of Rule I of the Rules made for the Umballa Cantonment under the Hackney Carriage Act, 1879, so as to be punishable under Section 7.

Petition for revision of the order of Captain R. F. Anderson, Cantonment Magistrate, Umballa, dated 12th April 1892.

The petitioner, a bania residing in the Cantonment of Umballa, was charged and convicted under Section 6 of the Hackney Carriage Act, 1879, for "driving a carriage without a license," and sentenced to a fine of Rs. 25. The accused was tried summarily under Section 260, Criminal Procedure Code.

The accused applied to the Chief Court for revision contending that he did not ply his carriage for hire and that there was no evidence that he did.

The judgment of the Court was delivered by

3rd Sept. 1892.

LOWDEN, J.—According to the extract from the “Register of petty offences, cognisable cases” of the Cantonment Magistrate, Umballa, which forms the sole existing record of this trial, the accused, who is a bania of Umballa Cantonment, has been charged and convicted under Section 6, Act XIV of 1879, the Hackney Carriage Act, for “driving a carriage without a license,” and sentenced to a fine of Rs. 25. The Magistrate has power to try cases summarily under Section 260, Criminal Procedure Code and the breach of a Rule under the Act is triable summarily.

Under the column “finding and sentence,” leaving out unimportant matters as to warnings, the whole of the information contained in the record is this: “The accused was driving his “phaeton ghari on 6th instant without a license [though “warned not to do so by Inspector of Police on 4th instant. “Inspector of Police testifies to warning him]. He has no “license and Police Sergeant Ismail testifies to his driving it “on the 6th. Accused also admits it was being driven on “latter date.”

In reply to certain enquiries from this Court—the extract furnished leaving it doubtful whether the charge referred to an unlicensed carriage or an unlicensed driver—it is now explained that the “accused was charged with driving his ghari, “without a license for the ghari, which is an offence against “Rule I of the Rules published under Section 4 of the Act. “Infringement of the Rules is made punishable under Section 6 “of the Act.”

Rule I runs as follows:—“Every hackney carriage (except as provided in Rule 24) shall be required to take out a “license from the Cantonment Committee.”

Section 6 appears to have been misquoted by the Cantonment Magistrate in place of Section 7, which runs as follows: “Any person breaking any rule made under the Act shall be “punished with fine which may extend to Rs. 50.”

Whether any infringement of the Rule above cited is possible, so as to render a person liable under Section 7 of the Act, is a question on which no opinion is necessary. It certainly is not obvious what person is liable to be punished under Section 7 if a hackney carriage does not take out a license, or if it is not required to take out a license, whichever may be the correct view of the obligation created by Rule I. But I have no manner of doubt that to drive an unlicensed carriage is not a breach of the Rule punishable under Section 7.

By Section 2 of the Act "hackney carriage" means "any wheeled vehicle drawn by animals and used for the conveyance of passengers which is kept, or offered, or plies for hire," and it is to be presumed that in the Rule I which is quoted "hackney carriage" is used in the same sense.

It does not appear that at the trial any evidence was given and there is no finding that the phaeton ghari referred to in the extract is a carriage which is kept, or offered, or plies for hire.

The importance of this definition is shown by Section 6 of the Act, under which section and Section 4, Rule I, is framed. That rule was probably intended to be a rule under clause (a) of Section 6, which enacts that a Rule may direct that "No hackney carriage or no hackney carriage of a particular description shall be let to hire, or taken to ply, or offered for hire, except under a license granted in that behalf": while clause (b) enacts that a Rule may direct that "No person shall act as driver of a hackney carriage except under a license granted in that behalf," to which clause Rule 9 corresponds. It is now clear that the Magistrate did not intend to convict of a breach of Rule 9, but there is not on the record the faintest suggestion that the accused had let to hire, or taken to ply, or offered for hire the carriage referred to in the extract.

In his application to this Court the petitioner says: "He drove the carriage to make the horses go properly: he did not ply for hire and there is no evidence that he did."

Under Section 263, Criminal Procedure Code, among the prescribed particulars in the record of a summary trial are—“(g) the plea of the accused and his examination (if any).”

The extract which forms the record of this case contains no corresponding column. It is impossible to say what the defence of the accused to the Cantonment Magistrate was; therefore impossible to say that it was not the same as he now urges.

In the absence of a finding, and, so far as appears of any evidence, that the carriage which accused was driving ought to have been a licensed carriage, the conviction clearly cannot stand. It is accordingly reversed, and it is ordered that the fine, if levied, be refunded.

The form of register used for this trial will form the subject of a separate order.

Application allowed: conviction quashed.

No. 8.

QUEEN-EMPRESS,

Versus

REVISION SIDE. }

GHAFUR AND SEVEN OTHERS,—ACCUSED.

Case No. 1145 of 1892.

(FLOWDEN & STOGDON, J.J.)

Indian Penal Code, Sections 149, 304 and 325—Unlawful assembly—Culpable homicide not amounting to murder—Voluntarily causing grievous hurt—New trial.

The accused eight in number and armed with lathis beat, first, M. A., then N. A. who came to his aid, and then A., who died of the injuries he received, his skull being extensively fractured.

The case was tried by a first class Magistrate, who convicted and sentenced the accused as follows—

G. under Section 148, Indian Penal Code: one year's rigorous imprisonment and Rs. 20 fine.

The other accused under Section 148, Indian Penal Code, four months' imprisonment and Rs. 10 fine.

Held, that the convictions and sentences must be set aside and the District Magistrate be directed to inquire into and try the case on charges as follows:—

G. on charges under Section 304 and Section 325, Indian Penal Code, and all the other accused under Sections 148 and 149, Indian Penal Code, in respect of the injury to and death of A.

All the accused on charges under Section 148 and Section 149, Indian Penal Code, as regards the injuries to M. A. and N. A.

Case reported for revision under Section 438, Criminal Procedure Code, by J. A. Anderson Esquire, Sessions Judge, Delhi, by order dated 16th July 1892.

The facts of this case sufficiently appear in the following judgment delivered by the Chief Court—

24th Augt. 1892. FLOWDEN, J.—Before passing a final order in this case, I desire to consult one of my learned colleagues.

The case for the prosecution was that the accused, eight in number and armed with lathis, beat, first, Mazhar Ali, then Nur Ali who came to his aid, and then Allahdia, who died of

the injuries received, his skull being extensively fractured. The Police charged Ghafur under Section 302, Indian Penal Code, and the rest under Section 148, Indian Penal Code. This was not approved by the District Magistrate who considered that the case was *prima facie* one under Section 302, Indian Penal Code, remarking, "there is nothing to show that the actual assailant was not taking the full risk of killing the deceased. The medical evidence suggests, taken with the rest, deliberate and cruel violence. On the other hand, if the risk of causing death was not contemplated, then the offence would be under Section 326 only." The case was sent to a Magistrate first class "to dispose of it according to law, either by inquiry or trial, as may appear proper, but a count under Section 302, Indian Penal Code, should certainly be added in the charge sheet."

The District Magistrate in passing from Section 302 to Section 326, Indian Penal Code, has entirely overlooked the offence of culpable homicide not amounting to murder defined in Section 299 and punishable under the second clause of Section 304, Indian Penal Code, where the act is done with the knowledge that it is likely to cause death but without any intention to cause death, or such bodily injury as is likely to cause death.

Eventually, a first class Magistrate charged and tried the accused on charges as follows:—Ghafur Section 302, Indian Penal Code, and the other accused under Section 148, Indian Penal Code, only. He sentenced Ghafur to one year's imprisonment and Rs. 20 fine, and the others to four months' imprisonment and Rs. 10 fine. Their appeals were rejected by the Sessions Judge, who added that Ghafur's sentence was to be regarded as under Section 148 rather than Section 325, Indian Penal Code. He has now forwarded the record for enhancement of sentence.

In my opinion, the proper course is to direct a new trial before the Sessions Court, all the accused, except Ghafur, being committed on charges under Sections 302 and 304, Indian Penal Code, in respect of the injury to and death of Allahdia, and Ghafur on charges under Section 304 and Section 325, Indian Penal Code, in addition to charges against all under Section 148 and under Section 302 as regards the injuries to Mazhar Ali and Nur Ali. It may be mentioned with regard to the conviction under Section 148, Indian Penal Code, that there is

no description of the lathis and no finding in either judgment that they are deadly weapons, or things, which used as weapons of offence, are likely to cause death ; and it cannot be said generally and as a matter of law that a lathi is either. The files will be laid before the Bench on the first Bench day for final orders.

7th Sept. 1892.

After reading the order, dated August 24th, of which a copy will accompany this order, we are of opinion that the course therein proposed is correct, subject to the slight modification that, reversing the convictions and sentences passed by the Magistrate, in place of directing a new trial before the Sessions Court, we direct that the case be sent for inquiry and trial into the Court of the District Magistrate, who is competent to dispose finally of all the charges of which there is evidence and who should have taken up the case himself in the first instance.

The sentence already suffered can be taken into account in passing sentence upon any of the accused who may be again convicted.

Convictions and sentences reversed and new trial ordered.

No. 9.

QUEEN-EMPRESS,

Versus

FATTU,—ACCUSED.

Case No. 1301 of 1892.

(PLOWDEN, J.)

REVISION SIDE. {

*Indian Railways Act, 1890, Section 101—Endangering safety of persons—
Gatesman asleep—Engine driver omitting to stop train—Sanction.*

The Magistrate found that the accused, a gatesman, was asleep on duty and did not open his gates when a train was coming : that the accused was therefore negligent on duty and the safety of human beings was thereby put in danger : and the Magistrate held that the accused was not free from responsibility because the engine driver also neglected to stop his train before reaching the gates.

Held that the conviction was right under Section 101, Indian Railways Act, 1890.

Held, also, that no sanction is necessary to the institution of a complaint of an offence punishable under Section 101.

*Case reported for revision under Section 438, Criminal Procedure Code, by P. D. Agnew Esquire, District Magistrate, Delhi.
by order dated 16th August 1892.*

The facts reported by the District Magistrate were stated as follows—

The driver of a night train on the Rajputana-Malwa Railway ran through a closed gate, which was in accused's charge at the time, while the accused himself was asleep on duty.

The accused, on conviction by Rai Bahadur Piyari Lal, exercising the powers of a Magistrate of the first class in the Delhi District, was sentenced, by order dated 23rd June 1892, under Section 101 of the Railways Act, IX of 1890, to pay a fine of Rs. 50 or to suffer three months' rigorous imprisonment in default.

The proceedings are forwarded for revision on the following grounds—

- I. Babu Mohindro Lal Ghose, who conducted the prosecution on behalf of the Railway authorities, acted without the sanction of his superior officers, and misrepresented to the Magistrate the duties of a gateman, which are merely to see his lamps properly lighted and to lower his signal and open his gates when he hears a train coming.
- II. The gate, of which accused was in charge, is protected on each side by a semaphore signal, the arm of which must be lowered before a driver is entitled to pass by day. The same lever which works the arm also works a spectacle in front of a lamp for use by night, which shows a red light when the arm is up, and a green light when the arm is lowered. After passing the signal, the driver at night would see a red light in the centre of the line on the gate if closed and a white light on the side, if open to the railway. Had the driver stopped his train when he saw the signals against him, as he was bound to do by Railway rules, there would have been no accident and only a short delay would have been necessary.
- III. The fault in my opinion lay with the driver and not the gateman, the conviction against whom should be quashed, and the fine refunded.

The following judgment was delivered—

9th Sept. 1892. PLOWDEN, J.—After reading the evidence of Babu Mohindro Lal Ghose, I cannot find that he gave any evidence as to the duties of a gatekeeper, so far as the record shows, and I am at a loss to understand upon what basis the allegation that he misrepresented to the Magistrate the duties of a gateman is founded.

The duty of a gateman is now described, on the authority of the Executive Engineer of the Railway, who has promoted this reference, to be “to see his lamps properly lighted and to “lower his signal and *open his gates when he hears a train coming.*” The Magistrate has found that the accused, a gateman, being asleep on duty did not open his gates when a train was coming; and that the accused was therefore negligent on duty and that the safety of human beings was thereby put in danger: and he holds that the accused is not free from responsibility because the engine driver also neglected to stop his train before reaching the gate.

A Railway servant, and a gatekeeper is such, who, when on duty, endangers the safety of any person by any negligent omission, commits an offence punishable under Section 101 of the Railways Act, 1890.

The conviction is right, unless it can be held that there is no evidence that the endangering of safety was the consequence of the gatekeeper's negligence.

But it is clear to my mind that this cannot be held. The immediate cause of the danger to personal safety was the collision between the train and the closed gates. The efficient causes of this collision were two, *viz.*, the continuance of the train in its course, notwithstanding the signals being against it, and the closed condition of the gates. The collision would have been impossible, in spite of the driver's omission to stop the train, if the gates had been opened as they ought to have been. That they were not opened was due solely to the neglect of the gateman who was asleep on duty.

There is no difficulty, to my mind, in accepting the view that, on the facts found, both the gatekeeper and the driver might be within the reach of Section 101, the former by reason of not having the gates open before an approaching train, the latter by reason of not stopping the train short of the closed gates. At present, I am concerned only with the gateman whose conviction by the Magistrate appears to be warranted by law on the facts found.

It is not clear whether revision is also sought on the ground that this prosecution which was instituted by the Babu, an Inspector of the Engineering Department, had not been sanctioned by his superior officer. No such sanction is requisite under the Railways Act or the Criminal Procedure Code. The due discharge by a Railway servant of a duty on which the safety of persons using a Railway may depend is a matter of public concern rather than of mere departmental discipline, and it is not apparent why departmental sanction to a prosecution for breach of the duty should be requisite.

The conviction will accordingly be maintained.

Conviction upheld.

No. 10.

AHMAD SHAH,—(ACCUSED),—APPELLANT,

Versus

QUEEN-EMPRESS,—RESPONDENT.

APPELLATE SIDE.

Case No. 361 of 1892.

(PLOWDEN & STODDON, JJ.)

Indian Penal Code, Sections 235 and 240—Possession of instrument for purpose of using the same for counterfeiting coin—Delivery of Queen's coin, with knowledge that it is counterfeit.

The accused went into a village and purchased sweetmeats from one K. for which he paid with a counterfeit two anna bit: he also delivered another counterfeit two anna bit to R. in payment for some milk. K., on discovering the fraud, pursued the accused and aided by two others, arrested him. On being pursued the accused threw away a yellow bag which was found to contain a mould, an instrument called a "gugi" used for keeping up a draught in a fire, a file and some white metal, all evidently instruments or materials used for counterfeiting coin.

Held, upon these facts, that the conviction should have been under Section 235, Indian Penal Code. and not under Section 240, the latter section not applying to the actual coiner and there being nothing to show under what circumstances the accused became possessed of the counterfeits of the Queen's coin.

Appeal from an order of conviction passed by C. E. Gladstone, Esquire, District Magistrate, Umballa, dated 3rd June 1892.

The accused was convicted of an offence under Section 240, Indian Penal Code, by the District Magistrate, Umballa, and sentenced to seven years' rigorous imprisonment. The conviction was confirmed by the Sessions Judge under Section 34, Criminal Procedure Code, but he reduced the sentence to five years' rigorous imprisonment.

The accused then appealed to the Chief Court. The judgment of the Court was delivered by

10th Sept. 1892.

STODON, J.—This is an appeal from a conviction under Section 240, Indian Penal Code, of fraudulent delivery of Queen's coin which the deliverer knew to be counterfeit at the time when he became possessed of it.

Accused who is a Muhammadan fakir went into the village of Kurali and purchased sweetmeats from one Kurta, for which he paid with a counterfeit two anna bit. He also delivered another counterfeit two anna bit to Ralla in payment of the price of some milk. Kurta discovered the fraud and he and his brother Moti pursued accused, who threw away a yellow bag which was found to contain a mould, an instrument called a "gugi" used for keeping up a draught in a fire, a file and some white metal, all evidently instruments or materials used for counterfeiting coin. Dhari, dafadar of chaukidars, came up and helped to secure accused.

Accused's defence was that the counterfeit coins were given to him by a fakir named Daya Ram whom he met on the road and who asked him to buy food in the village and to bring it to him in the takia outside the village. The bag and coining implements he asserted belonged to the fakir and not to him. He appears to have made this assertion from the very first and search was made for Daya Ram, but he could not be found. In appeal, accused asserts that Daya Ram is the real culprit and that the Deputy Inspector took a bribe to let him go. It is possible that accused had an accomplice, but the evidence is clear that he threw away the bag containing the coining tools, and there is not sufficient reason for disbelieving it or for thinking that he did not know that the coins were counterfeit. The conviction under these circumstances should not have been under Section 240, Indian Penal Code. That section does not apply to the actual coiner, and there is nothing to show under what circumstances accused became possessed of the counterfeits of the Queen's coin. The conviction should have been under Section 235, Indian Penal Code, and we alter it to one under that section. As the sentence appears to be unduly severe, we alter it to one of rigorous imprisonment for three years, three months to be in solitary confinement.

Appeal dismissed: sentence reduced.

No. 11.

MUHAMMAD KHAN,—PETITIONER,

Versus

MUHAMMAD RAMZAN,—RESPONDENT.

} REVISION SIDE.

Case No. 1092 of 1892.

(PLOWDEN, J.)

Criminal Procedure Code, Section 195—Sanction to prosecute for false charge of offence and giving false evidence.

M. R. made a charge against M. K. and others of a violent assault upon him and others. The charge was investigated by a Magistrate and M. K. was discharged.

The Magistrate and Sessions Judge refused sanction under Section 195, Criminal Procedure Code, to M. K. to file a complaint against M. R. under Section 211, Indian Penal Code.

Held, under the particular circumstances, that this was a fit case in which sanction should be given.

*Petition for revision of an order of R. L. Harris, Esquire,
Sessions Judge, Ferozepore, dated 23rd May 1892.*

Gouldsbury, for petitioner.

Shircore, for respondent.

This was an application to revise an order of the Sessions Judge, Ferozepore, upholding the order of a Magistrate refusing sanction to the petitioner to file a complaint against the respondent for bringing a false charge against him and of giving false evidence.

The facts are given in the judgment of the Court which was delivered by

PLOWDEN, J.—I have heard Mr. Shircore at length for the 10th Sept. 1892. original prosecutor and considered his argument.

The main facts are these: Prosecutor made a charge against Muhammad Khan and others of a violent assault upon him and others. This charge was investigated by a Magistrate and the accused was discharged. The prosecutor and Muhammad Khan are acquainted with each other, and not on good terms. According to prosecutor's story, Muhammad Khan had in daylight attacked him and wounded him on the shoulder with a gandasa or chhavi.

The Magistrate in his judgment discharging the accused, found that the nature of the injuries on the prosecutor was most suspicious: that they had not been shown at the police

chouki to which he went immediately after the alleged assault, or to the Magistrate whom he met at the chouki. He thought there had been a good deal of fabrication on the part of the complainants and almost all the witnesses were tutored. As to identification, he found it was a striking fact that prosecutor had not named any of the accused to the constable at the chouki or to the Magistrate there, nor in the first report to the police (excepting Imam Din) and he found that the names of the accused were subsequently invented.

On Muhammad Khan's application for permission to prosecute the prosecutor under Sections 211, 193 and 195, Indian Penal Code, the Magistrate refused leave and recorded an order "that there is no reason to hold that the substantial facts relating to assault are false and groundless. It cannot be conclusively said, after going through the file, that Muhammad Khan, petitioner, was not present in this fight. He may have been or he may not. Consequently there are no sufficient reasons to grant permission under Section 211, Indian Penal Code." Further he says: "There is nothing on the file to establish a charge under Section 193 or Section 195. I do not think that the offence defined in the said sections can be thoroughly proved by the evidence on the file."

This is a very extraordinary order. Muhammad Khan's case is that he was not present at all at the time of the alleged assault. If he was not, the prosecutor has clearly been guilty of making a false charge knowing it to be false, and of giving false evidence. Naturally, on the file at which the Magistrate looked, there could not be any conclusive proof that Muhammad Khan was not present, nor could any proof of offences under Sections 193 and 195, Indian Penal Code, by the prosecutor be expected, seeing that the Magistrate disbelieved the evidence for the prosecutor and discharged the accused without taking any evidence to contradict the evidence for the prosecution. Further, conclusive proof is not what is needed before sanction to prosecute is granted. What is needed is a *prima facie* case, and that exists on the face of the Magistrate's judgment when coupled with the petitioner's allegation that he was not present at all at the alleged fight. It may be perfectly true that there is some substantial foundation for the allegation that the prosecutor and his friends were assaulted. That is not the point. The question is, whether assuming that there was an assault, the prosecutor charged the accused as being in it knowing full well that he was not.

This is the petitioner's case and he asserts he can prove it and asks permission to be allowed to do so ; and he shows ample ground for permission being granted. If the true state of the case is such as the petitioner undertakes to prove, the prosecutor is a person who richly deserves to be punished. I do not in any way prejudge the coming inquiry, but at present I have the decision of a Magistrate who heard all the evidence for the prosecutor, not merely that the accusation was not proved, but that it shows strong indications of being false and fabricated ; and that, after hearing counsel for the prosecutor, seems *prima facie* sufficient to warrant sanction being granted to the petitioner to institute criminal proceedings.

The charge made against him by Muhammad Ramzan was made on February 20th, 1892, to the Thanadar, Ferozepore, when he went to the spot in consequence of the report made at the thana on February 19th, by one Kamar Din, who professed to have been sent by one Jamal Din Khan, who had been in company with Muhammad Ramzan at the time of the alleged assault. There was no complaint before the Magistrate, but Muhammad Khan and others were chalaned by the Police to the Magistrate under Section 307, Indian Penal Code. In the inquiry, Muhammad Ramzan was examined as a witness.

I grant sanction, accordingly, for the prosecution of Muhammad Ramzan under Section 211, Indian Penal Code, in respect of the charge made by him on February 20th, to the Thanadar, Ferozepore, and under Sections 193 and 195, Indian Penal Code, in respect of the evidence given by him as a witness in the judicial proceeding held in the Court of Rai Shiv Narain, Magistrate, 1st class, Ferozepore, between the 7th March and 4th April 1892.

Order accordingly.

No. 12.

DHARI,—(ACCUSED),—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Case No. 1325 of 1892.

(PLOWDEN, J.)

Criminal Procedure Code, Section 110—Security for good behaviour from habitual offenders—Evidence.

Although specific offences need not be proved to have been committed by the person against whom an order is made under Section 112, Criminal

REVISION SIDE.

Procedure Code, it is nevertheless necessary that there should at least be evidence of general repute that he is a habitual offender of the class described in Section 110.

It is easy to use Section 110 for purposes of oppression if Magistrates are not careful to require clear proof against the accused.

Petition for revision of the order of H. B. Beckett, Esquire, District Magistrate, Rawalpindi, dated 22nd July 1892.

The accused was required by Captain C. J. Dennys, Cantonment Magistrate, Rawalpindi, by order under Section 118, Criminal Procedure Code, to execute a bond with two sureties for Rs. 100 for maintaining good behaviour for six months, or in default to undergo rigorous imprisonment for a like period.

The District Magistrate upheld the order upon appeal.

The accused then applied to the Chief Court on the Revision Side. The judgment of the Court was delivered by

30th Novr. 1892.

LOWDEN, J.—There is no evidence against the accused that he is a person of the reputation described in Section 110, Criminal Procedure Code, except that of the Sergeant Asa Khan. He says that accused has been suspected of stealing a gun, and of other offences; that he gambles and receives stolen property. He admits that his house has never been searched.

Against this there is proof that he is a Kabari and has a shop, and holds a license for a bamboo cart from the Municipal Committee.

The Magistrate is perfectly correct in holding that specific offences need not be proved to have been committed by the person on whom an order under Section 112 has been made. This is clear from Section 117, which permits the fact, that a person is a habitual offender to be proved in an inquiry under that section, by evidence of general repute or otherwise.

But it is necessary that there should at least be evidence of general repute that he is a habitual offender of the classes described in Section 110.

The evidence in this case is too slender to justify a finding that the accused is by general repute a habitual receiver of stolen property or a habitual thief. There is no previous conviction: his house has not been searched: that he had to give security before is no evidence that he is an offender now of any of the kinds described.

at It is easy to use Section 110 for purposes of oppression, if
g Magistrates are not careful to require clear proof, and such
proof ought always to be insisted on by District Magistrates.
In the present case the District Magistrate's judgment is as
unsatisfactory as that of the Magistrate who made the order.

The order requiring security from the applicant Dhari is
accordingly reversed.

Application allowed : order requiring security cancelled.

REVENUE JUDGMENTS,
1892.

REVENUE JUDGMENTS.

No. 1.

DAULAT KHAN,—(DEPENDANT),—PETITIONER,

Versus

MAST ALI,—(PLAINTIFF),—RESPONDENT.

REVISION SIDE.

Case No. 387 of 1890-91.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Plaint—Secundum allegata—*Decree for occupancy rights on basis other than that sued for*—*Material irregularity.*

The plaintiff sued for occupancy rights under Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887: the Commissioner being of opinion that the plaintiff had a right of occupancy under sub-section (1) (a) decreed accordingly, considering it unnecessary to determine whether the plaintiff was entitled to succeed upon the grounds alleged by him in his plaint.

Held by the Financial Commissioner on revision, that it was a material irregularity on the part of the Commissioner to award the plaintiff a higher status than that asked for. The plaintiff had made no claim under section 5, sub-section (1) (a), or amended his plaint asking for such relief, or in any way advanced a claim to be of a higher status than that described in sub-section (1) (d).

Petition for revision of the decrees of G. M. Ogilvie Esquire, Commissioner, Lahore, dated 13th May 1891.

Sham Lal, for respondent.

The plaintiff sued to contest a notice of ejectment in respect of 3 kanals 10 marlas of land, claiming rights of occupancy under Section 5, sub-section (1) (d), Tenancy Act, 1887. The first Court decreed the plaintiff's claim; but upon appeal the Collector of Gurdaspur (Lieutenant-Colonel J. B. Hutchinson) dismissed the suit.

Upon further appeal, the Commissioner (Mr. G. M. Ogilvie) held that "the point whether the plaintiff and his predecessors did or did not come under the definition of "jagirdars * may be doubtful. It is not necessary to decide

* Cf. Section 5, "it because the plaintiff is entitled to sub-section (1) (d). "occupancy rights on other grounds. It

“is clear that he and his direct male predecessors for more than two generations had, at the period when the Tenancy Act commenced, occupied this land for more than twenty years without payment of any rent. This is enough to constitute the plaintiff an occupancy tenant under Section 5, sub-section (1) (a) of the Act. It is immaterial that the position of the occupiers was that of mafidars; or, if it signifies, it adds to the strength of plaintiff's case. The mafi has been resumed and the plaintiff can now be charged with revenue and rent. But there appears not to be the slightest doubt that he has acquired occupancy rights in this plot under Section (5), sub-section (1) (a). Appeal accepted: order of Collector reversed: and order of first Court affirmed. The tenant is a tenant under Section 5, sub-section (1) (a) of the Act.”

The defendant then moved the Financial Commissioner on the Revision Side. The following judgment was delivered—

7th Decr. 1891.

FINANCIAL COMMISSIONER.—I think it was a material irregularity on the part of the Commissioner to award to the plaintiff a higher status than that for which he had sued. Plaintiff sued for occupancy rights under Section 5, sub-section (1) (d).

The first Court gave him a decree. The second Court dismissed his claim. The Commissioner thought it was unnecessary to decide whether plaintiff come within the terms of Section 5, sub-section (1) (d) or not, but holding him to come within Section 5, sub-section (1) (a), gave a decree under that clause.

Now plaintiff had made no claim under that clause and had never amended his plaint, or in any way advanced a claim to be of higher status than that described under Section 5, sub-section (1) (d). I think the Commissioner was bound to decide on the claim as brought, and I must request him to do so.

Costs to be costs in the cause and to follow the event.

Application allowed.

No. 2.

NATHU AND LALJI,—(DEFENDANTS),—APPELLANTS,

Versus

ATMA RAM,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Case No. 19 of 1890.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Punjab Tenancy Act, 1887, Section 5, sub-section (1) (d)—Occupancy rights—Jagirdar under grant from Sikh Government.

Held, that the holder of a jagir granted in A. D. 1809 by an officer of the Sikh Government on behalf of that Government and resumed by the British Government at annexation, was a "jagirdar" within the meaning of Section 5, sub-section (1) (d), Punjab Tenancy Act, 1887, which confers, under the circumstances specified therein, rights of occupancy on persons who have been jagirdars of the lands occupied by them.

Further appeal from the decree of G. Smyth, Esquire, Commissioner, Jullundur, dated 11th July 1890.

Bates, for tenants.

Lakhshmi Narain, for landlord.

This was a suit for enhancement of rent: the Court of first instance, holding that the defendants were occupancy tenants under Section 5, sub-section (1) (d), Tenancy Act, 1887, gave plaintiff a decree enhancing the rent to a sum equivalent to the revenue, plus three annas in the rupee malikana.

The Commissioner (Mr. G. Smyth) upheld the lower Court's decree, but on the ground that the land being in the vicinity of Hoshiarpur was very valuable and also fertile, enhanced the rent, on the plaintiff's cross appeal, to the rate of the revenue and cesses, plus four annas in the rupee malikana.

Both parties appealed to the Financial Commissioner, who, at the first hearing, remanded the case by the following interlocutory order for further enquiry as to whether the ancestor of the tenant to whom the revenue was assigned in the time of the Sikhs was a "jagirdar" within the meaning of Section 4, sub-section (15), of the Tenancy Act—

In this case it has been held by both the lower Courts **26th March 1891.** that the tenants come under sub-section (1) (d), Section 5 of the Tenancy Act. The first Court awarded an enhancement of rent which would give the plaintiff a malikana equal to three annas in the rupee of Government revenue. The Commissioner raised the enhancement to four annas on the appeal of the landlord, there being cross-appeals in the Commissioner's

Court. Here both sides have again appealed, and the most important point is that raised by the landlord, viz., that the tenants do not come within the category of tenants described in Section 5, sub-section (1) (d), of the Tenancy Act, for the reason that the mafi was originally conferred by a Sikh Kardar and was resumed by the British officers on annexation, the ground given for resumption being that the mafi was originally conferred by a Kardar only. When this point was pressed in the first ground of appeal to the Commissioner, he disposed of it by the remark that it was immaterial by whom the mafi was conferred. I cannot agree in that view because clause 15 Section 4 of the Act clearly lays down that the term jagirdar as used in the law means a person other than a village servant to whom the land revenue has been assigned by the Government or by an officer of the Government.

Now, the question is whether the Kardar who conferred this mafi in the first instance was an officer of Government whom the Sikh Government had authorised to grant mafis of this description. The early British officers do not seem to have given much weight to the alleged authority of the Kardar for they promptly resumed the mafi conferred by him. There is no evidence in the file which enables me to decide the above stated questions satisfactorily. I must therefore remand this case to the Commissioner for a finding on the following points, after making enquiry through the first Court, if necessary—

- (1). Was the ancestor of the tenant to whom the revenue was assigned in the time of the Sikhs, a jagirdar within the meaning of Section 4, clause 15, of Act XVI of 1887 ?
- (2). If not, and if the tenant only comes under Section 6 of the Act, to what extent should the rent be enhanced ?

The Commissioner on remand found that in the file of 1846-47, which formed part of the record, there were copies of two sanads granting 10 ghumaos in mafi to Suraj Bhan; that these copies had been filed on the 4th June 1846 and bore the attestation of the officer before whom they were produced (Sir Richard Temple apparently); and that they had been compared with the originals and found to be correct. The Commissioner, after setting out the details of these grants proceeded thus: "Both grants therefore were grants by officers of the Sikh

“Government on behalf of that Government, and such being the fact, the tenants were jagirdars within the meaning of clause 15, Section 4 of the Act.”

At the further hearing of the appeals, the final judgment of the Financial Commissioner was delivered as follows—

Having heard counsel and read the return made by the *3rd Decr. 1891*. Commissioner on the issues sent down, I am of opinion that the finding is correct and that the appeals of both parties should be dismissed with costs.

Decree will issue accordingly.

Appeals dismissed.

No. 3.

ATAR SINGH,—APPELLANT,

Versus

BAGHEL SINGH,—RESPONDENT.

} APPELLATE SIDE.

Case No. 44 of 1890-91.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Zaildars—Hereditary claims, other things being equal.

Although no right to the office of Zaildar arises from the fact that the claimant is related to the former holder of the office, yet it is equally true that such relationship is no disqualification.

If, among the claimants, it were found that the man who was selected as having the strongest claim on the recognised grounds were also son of the late holder of the office, a Collector might very fairly feel confirmed and supported in his choice.

The dictum, that appointments should, as far as possible, not be of an hereditary character, disapproved.

Punjab Record, Nos. 6 of 1887 and 5 of 1890, Revenue, referred to.

Further appeal from the order of G. Smyth, Esquire, Commissioner, Jullundur, dated 2nd April 1891.

Oertel, for appellant.

Morton, for respondent.

This was a contest for the office of Zaildar in the Ludhiana District.

The Collector (Colonel W. J. Parker) appointed Atar Singh, the son of the late Zaildar.

The Commissioner (Mr. G. Smyth) upon appeal cancelled this appointment and gave the office to Baghel Singh, who was

a Subadar-Major in the 40th Regiment of Bengal Infantry. The Commissioner recorded that "the appellant was a Subadar-Major in the 40th Native Infantry and is fully qualified as regards fitness, and his distinguished services to the State are entitled to consideration. Appellant was not properly represented before the Collector as he had not taken his pension up to the time of the Collector passing orders.

"The respondent (Atar Singh) is no doubt the best of the remaining candidates, but that the Collector found no marked pre-eminence in him is manifested by his finding it necessary to take votes to ascertain which of the men in the *zail* had the greater popularity. Moreover, the respondent is the son of the deceased Zaildar, and it is desirable that appointments to this office should, as far as possible, not be of an hereditary character."

Atar Singh appealed to the Financial Commissioner who remanded the case to the Commissioner for reconsideration and a fresh decision by the following judgment—

1st Decr. 1891.

FINANCIAL COMMISSIONER.—The Collector after careful consideration appointed Atar Singh, appellant, to be Zaildar. Atar Singh is the son of Fauja Singh (deceased), the late Zaildar. Atar Singh was admittedly the best of the candidates who were represented before the Collector. The respondent, Sardar Baghel Singh, was Subadar-Major of the 40th Bengal Infantry and was not able to appear before the Collector when the appointment was made, but he subsequently appealed to the Commissioner, who, after keeping the case pending in his Court for nearly fifteen months, accepted the appeal, displaced Atar Singh, and appointed Baghel Singh.

This really seems to be a very hard measure, so far as Atar Singh is concerned, and against whom the chief objection mentioned by the Commissioner is that he is the son of the deceased Zaildar. The Commissioner says that it is desirable that appointments to this office should, as far as possible, not be of a hereditary character. I am, however, not able to assent to this view in its entirety.

It is no doubt true that no right to the office of Zaildar arises from the fact that the claimant is related to the former holder of the office, but it is equally true that such relationship is no disqualification. Indeed, I would go a little further and say that, if among the claimants it were found that the man who

was selected as having the strongest claim on the recognised grounds, was also son to the late holder of the office, a Collector might very fairly feel confirmed and supported in his choice.

I am very unwilling at the present stage to reverse the order of the Commissioner, but on the record, as it stands, I must say I think that this would be the proper order to pass, unless it were made out that Atar Singh had failed in the performance of his duties during the one and a half years during which he held office. There is nothing on the record to show how he succeeded as Zaildar, and into this matter some enquiry might now be made with advantage.

With reference to the foregoing remarks, I return the case to the Commissioner for reconsideration and a fresh decision.

I call special attention to *Punjab Record*, No. 6, Revenue, for 1887, and No. 5 of 1890, Revenue, and to the fact that Atar Singh actually held the appointment from the 11th November 1889 to the 1st April 1891, and that he was appointed by a Collector intimately acquainted with the district. Also, that when the Collector himself took the votes, not a single one was recorded for Sardar Baghel Singh.

No costs allowed in this Court.

Case remanded.

No. 4.

GOPAL SINGH,—(DEFENDANT),—APPELLANT,

Versus

KHUSHAL KHAN AND PIR MUHAMMAD,—(PLAINTIFFS),

—RESPONDENTS,

Case No. 87 of 1890-91.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Appeal—Non-appearance of appellant—Dismissal for default.

If on the day fixed in that behalf for the hearing of an appeal, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default (Section 551, Civil Procedure Code, and Section 88, Punjab Tenancy Act, 1887).

} APPELLATE SIDE.

Appeal from the decree of S. S. Thorburn, Esquire, Commissioner, Rawalpindi, dated 8th April 1891.

Ishwar Das, for appellant.

This was a suit by the landlords for enhancement of the rent of the defendant who was an occupancy tenant under Section 6, Punjab Tenancy Act, 1887. The Court of first instance dismissed the suit on the ground that similar tenants in the village (tahsil Kahuta, Rawalpindi District) only paid two annas per rupee of revenue while defendant was already paying more than four annas.

The Commissioner (Mr. S. S. Thorburn) notwithstanding the absence of the plaintiffs, appellants, decreed in their favour as follows—

“The plaintiffs appeal: they are absent, but defendant is present. The practice of this Court is to enhance in such cases up to eight annas, and in special cases to six annas only. There is no reason why the practice should not be here followed. I accept appeal and enhance to eight annas per rupee of revenue.”

The defendant appealed to the Financial Commissioner, who remanded the case to the Commissioner by the following judgment—

7th Decr. 1891.

FINANCIAL COMMISSIONER.—In this case the Commissioner was bound to dismiss the appeal on default, seeing that the appellant did not appear on the day fixed for hearing, see Section 551 (2), Civil Procedure Code. Instead of obeying the law, the Commissioner accepted the appeal and decreed enhancement of rent. The Commissioner should now substitute for his order of the 8th April 1891 an order dismissing the appeal on default. If, within 30 days of the date of the fresh order, the appellant to Commissioner's Court prefers and succeeds in an application under Section 558, Civil Procedure Code, the Commissioner should fix a fresh date and proceed to dispose of the appeal according to law. It is quite clear that unless the plaintiff can give satisfactory reasons for his default, the defendant is entitled to gain his case by reason of that default.

Plaintiff will pay the costs of this appeal.

Appeal allowed.

No. 5.

NIHAL SINGH AND OTHERS,—(PLAINTIFFS),—
PETITIONERS.

Versus

HIRA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Case No. 379 of 1890-91.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Occupancy tenants—Status—Res judicata.

In a suit for enhancement of rent, the Settlement Collector declared the tenants to come under Section 6 of the Tenancy Act, 1887, and enhanced their rent accordingly. The tenants had not expressly claimed any particular status, and the question of their status was not expressly put in issue.

Held, in a subsequent suit by the tenants to establish a right of occupancy under Section 5, sub-section (1) (a) of the Tenancy Act, that the lower Courts had rightly held that the question of status had already been decided.

The tenants should have raised the point in their answer to the first suit: this they omitted to do, and the provisions of Section 13, Explanation II, operated to make the question *res judicata*.

Petition for revision of the order of G. M. Ogilvie Esquire, Commissioner, Lahore, dated 23rd May 1891.

The only question for consideration in this case was whether the second suit, which had been instituted by the plaintiffs, petitioners for revision, was *res judicata* by reason of the decision in a previous case in which they were defendants, and in which they had failed to make their alleged status as tenants under Section 5, sub-section (1) (a) of the Tenancy Act, ground of defence. The Commissioner in disposing of an application for review of judgment, remarked: "I refuse to allow litigation to be reopened on the technical point whether the appellate Courts were correct in their ideas as to what constitutes *res judicata*. Substantial justice has been done by the decisions as they stand and that is all that I care about. I do not think that in Revenue suits we are bound by the strictly technical rules of the Civil Procedure Code."

The facts sufficiently appear from the judgment of the Financial Commissioner.

FINANCIAL COMMISSIONER.—I am not prepared to interfere 31st Augt. 1891.
in this case on the Revision side.

In the original suit for enhancement of rent, Mr. Walker, the Settlement Officer, declared the tenants to come under Section 6 of the Tenancy Act, and enhanced their rent accordingly. The tenants had not expressly claimed any particular status, and their status was not expressly put in issue, but the tenants should undoubtedly have clearly raised the point in their written plea, or in their appeal to the Commissioner. This they omitted to do, and there can be no doubt in my opinion that the question of status is *res judicata* under Section 13, Explanation II, Civil Procedure Code. The question of status is surely one which in the suit for enhancement of rent might and ought to have been made a ground of defence. This being so, it must be deemed to have been directly and substantially in issue in such suit.

I think, therefore, that in a subsequent suit by the tenants to establish a right of occupancy under Section 5, sub-section 2 (a) of the Tenancy Act, the Collector and Commissioner rightly held that the question of status had already been decided. The Commissioner of Lahore has now declined to review the orders of his predecessor, dated 9th March 1889, in the enhancement case, or in the subsequent case, and I am unable to hold that in refusing to review this order on the ground that it was a correct order, the Commissioner has acted with any material irregularity or failed to exercise a jurisdiction vested in him by law.

In regard to the last paragraph of the Commissioner's judgment, date 23rd May 1891, I have to remark that it appears to be of the nature of surplusage and to be withal incorrect, as under Section 88, sub-section (2) (a) of the Tenancy Act, Revenue Courts are bound by the Civil Procedure Code in regard to the procedure to be followed in the trial of judicial Revenue suits.

Application refused.

NOTE.—An application for review of judgment was rejected by the Financial Commissioner on the 11th January 1892.

No 6.

FAZLA,—(PLAINTIFF),—PETITIONER,

Versus

LAL SINGH,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 409 of 1890-91.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Ejectment—Omission to direct tenant to file a statement of claim to compensation—Material irregularity.

It is a material irregularity if a Court of first instance omits, in a suit to contest a notice of ejectment, to call upon the tenant to file a statement of his claim, if any, to compensation for improvements or for disturbance, and of the grounds thereof, in pursuance of the directions contained in Section 70, Punjab Tenancy Act, 1887.

Punjab Record No. 13 of 1890, Rev., referred to.

Petition for revision of the order of Major J. Montgomery, Collector, Sialkot, dated 19th June 1891.

This was a suit by a tenant to contest a notice of ejectment, in respect of 176 kanals 3 marlas of land.

The first Court decreed that the plaintiff was entitled to keep the land until the defendant paid him Rs. 135 as compensation for disturbance.

The plaintiff appealed to the Collector of Sialkot urging that he was also entitled to compensation for trees and buildings. The Collector in dismissing the appeal said: "The village was given to defendants' ancestor in the beginning of British rule. The plaintiff's cultivation dates from some years subsequent to the founding of the village. He has not a right of occupancy. All that he is entitled to is compensation for disturbance, as he first broke up the soil, and that has been awarded to him at a fair rate."

The plaintiff then applied to the Financial Commissioner for revision, and the case was remanded by the following judgment—

FINANCIAL COMMISSIONER.—There appears to have been 8th Decr. 1891. material irregularity in the way in which this case was disposed of. The first Court omitted to call upon plaintiffs for a full statement of their claim to compensation under Section 70

of the Tenancy Act. Compensation was not allowed for trees and buildings and the tenants appealed on this point to the Collector, but the Collector did not expressly deal with the question. Compensation for disturbance only has been allowed. I accept this application and remand the case to the first Court for fresh decision after full investigation and disposal of all the plaintiff's claims for compensation in accordance with Section 70 of the Tenancy Act; *cf.* also *Punjab Record* No. 13 of 1890, Revenue.

Costs in this Court to follow the event.

Application allowed.

No. 7.

REVISION SIDE. { BAHALA,—(PLAINTIFF),—PETITIONER,
Versus
MAMRAJ & OTHERS,—(DEFENDANTS),—RESPONDENTS.
Case No. 441 of 1890-91.
(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Appeal dismissed for default—Notice to appellant of time and place for hearing.

In the matter of fixing dates and places for hearing suits and appeals, Revenue Courts are bound by the same rules as Civil Courts.

Held, therefore, that where the Collector disposed of an appeal in camp, no notice of the place for hearing being given by him—an application under Section 558, Civil Procedure Code, to restore the appeal being rejected by the Collector, which order was upheld by the Commissioner on appeal—the proceedings of both the lower appellate Courts must be set aside with a direction to the Collector to rehear the appeal, after fixing a date and place for this purpose and giving notice thereof to the parties.

Punjab Record, No. 48 of 1875, Civil; **Judicial Circular XIII*, para. 11, (page 50, 3rd edition); and †*Revenue Circular* No. 17, para. 23 (Vol. I, page 71,) referred to.

* It is often difficult for a superior Court to judge whether the parties in a case have had proper opportunities of attending where the case is heard. In all cases, therefore, that are heard away from the head-quarters of a Judicial Officer, the place of hearing, as well as the date, should be distinctly entered in the proceedings.

† Revenue Officers should be guided by the provisions of the Circulars issued by the Chief Court for the guidance of Civil Courts, so far as these are applicable to cases heard in Revenue Courts.

*Petition for revision of the order of Colonel L. J. H. Grey, C.S.I.,
Commissioner, Delhi, dated 7th June 1891.*

This was a suit by a tenant to contest a notice of ejectment. The Court of first instance having dismissed the suit, the plaintiff appealed to the Collector. On the 17th March 1891, the Collector disposed of the appeal as follows: "Appellant absent since 15th, the date fixed for hearing. Respondents present for two days: case dismissed in default."

The appellant having applied to have the appeal restored, the Collector refused the application on the following grounds: "The appellant has applied for a rehearing on the ground that he was not informed of the place of hearing and that the case was heard in camp and dismissed in his absence. The respondents have appeared to object to this.

"I can see no good reason for a rehearing. Circular XIII applies only to Civil suits and to Civil Judges, and cannot possibly apply to Collectors who are supposed to be in camp in the cold weather, and who could not fix the dates of their various camps a long time before."

The Commissioner rejected an appeal from this order holding that "the best proof that the plaintiff could have attended is that defendants did attend and were present for three days in the Collector's camp. I consider that the Collector was right in refusing to reopen the case, and I dismiss the appeal against his order refusing to do so."

The plaintiff then moved the Financial Commissioner on the Revision side. The Financial Commissioner, differing from the lower Courts, remanded the appeal for rehearing by the following judgment—

FINANCIAL COMMISSIONER.—I entirely differ from the Collector and the Commissioner in their view that Revenue Judicial Courts are not bound in matters of this kind as Civil Courts are bound. If a Collector proposes to hear a Revenue judicial case he is bound to give the parties notice of date and place, *see* the Chief Court decision reported as Civil Judgment, *Punjab Record*, No. 48 of 1875; Judicial Circular XIII, para. 11; Revenue Circular No. 17, para. 23. If a Collector is on tour and unable to make a programme of dates and places to which he can adhere for hearing judicial cases, he should postpone their hearing till his return to the Sadr. 8th Decr. 1891.

I find that the notice in this case fixed Sunday the 15th March for hearing, and that no place of hearing was specified. I set aside the orders of the lower appellate Courts and direct the Collector to hear the appeal, after fixing a date and place and duly warning the parties.

No costs allowed in this Court.

Case remanded.

No. 8.

IN THE MATTER OF THE DISMISSAL OF LEHNA
SINGH, A LAMBARDAR IN THE SIALKOT

DISTRICT.

} REVISION SIDE.

Case No. 96 of 1891-92.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL
COMMISSIONER.)

Lambardar—Removal of, from office when required by the Criminal Courts to give security for good behaviour—Duty of Collector.

Lehna Singh, a lambardar in the Sialkot District of sixteen years standing, was required by a competent Magistrate to give security for good behaviour for one year in a bond for Rs. 500. The Magistrate recorded evidence and held that Lehna Singh was the abettor of thieves and habitually received stolen property: he accordingly made an order against Lehna Singh under Sections 110 and 118, Criminal Procedure Code.

Lehna Singh appealed to the District Magistrate, who dismissed the appeal.

Upon the same day, the Collector of the District took up the case on the Revenue side to consider whether Lehna Singh was a fit person to retain the office of lambardar: the Collector dismissed him on the ground that it had been proved that he was a habitual receiver of stolen property and had been called upon to furnish security for one year.

Lehna Singh then appealed to the Commissioner, who reversed the Collector's order and directed that Lehna Singh be restored to his office on the ground that he had been "mechanically dismissed by the Collector "because the man had been put on security under Section 110, Criminal "Procedure Code, by a Magistrate."

Held by the Financial Commissioner, that when a lambardar has been ordered by a Magistrate to give security for good behaviour under the provisions of the Criminal Procedure Code and has failed, as Lehna Singh had failed, to get the order set aside either by the District Magistrate on appeal or by the Chief Court in revision, the lambardar is *prima facie* liable to dismissal from his office.

This, however, is not to be taken to mean that the Revenue authorities have no option in the matter and are absolutely bound to pass an order of dismissal, but those authorities would ordinarily fail in their duty if they retained such a lambardar in office unless he could show very strong reason why he should not be removed.

Ordinarily, such an order of dismissal should not be made immediately after the rejection of an appeal by the District Magistrate refusing to set aside an order requiring security: a lambardar should first be suspended and the question of his dismissal or otherwise postponed until after the lapse of a reasonable time—say six months—to enable him to contest the order requiring him to give security.

Case disposed of by the Financial Commissioner in exercise of the powers conferred by Section 16, Punjab Land Revenue Act, 1887.

The facts necessary to the understanding of the questions raised in this case fully appear from the following order made by the

2nd May 1892.

FINANCIAL COMMISSIONER.—In this case it appears that Lehna Singh, a lambardar in the Sialkot District, was on the 19th February 1891 ordered by a competent Magistrate to give security in a bond for Rs. 500 for one year under Section 110 of the Criminal Procedure Code. The Magistrate, after taking evidence, had found that Lehna Singh was the abettor of thieves and habitually received stolen property.

Lehna Singh appealed to the Magistrate of the District, Major Montgomery, who dismissed the appeal on the 23rd March 1891. Major Montgomery then proceeded forthwith in his capacity of Collector to consider whether Lehna Singh was fit to remain as lambardar. The Collector dismissed (this order also bears date 23rd March 1891) Lehna Singh from his lambardarship on the ground that he had been proved to be a habitual receiver of stolen property and had been called upon to furnish security for good behaviour in a bond for Rs. 500 for one year.

Lehna Singh did not take (and has not taken up to present date) any further proceedings to set aside the sentence of the Criminal Courts, but he appealed to the Commissioner of the Division against the order of the Collector dismissing him from his lambardarship.

The Commissioner, Mr. Thorburn, accepted the appeal and restored Lehna Singh to his office in the following order, dated 17th August 1891 :

“In this case, a lambardar of sixteen years standing, as such, against whom no complaints had, as far as can be ascertained, been hitherto made in those sixteen years, has been mechanically dismissed by the Collector because the man had been put on security under Section 110, Criminal Procedure Code by a Magistrate (Malik Kutub-ud-din, Extra Assistant Commissioner). The conviction under that section was due to general depositions by the zaildar, Hukm Din, one Allah Ditta, a distant lambardar, and one Bana, a neighbouring lambardar, that appellant was a receiver of stolen goods. The Deputy Inspector also said he had heard the same. The

“Collector dismissed the lambardar from office without further enquiry, making the dismissal a legal consequence of the conviction under Section 110, Criminal Procedure Code, and holding that neither he nor the Appellate Court was competent to consider facts in evidence in the Section 110 case. The Collector’s view of the law appears to me erroneous. The conviction must be accepted as such, but in deciding whether or not to impose the further and socially ruinous punishment for appellant, and his sons after him, of dismissal, it is competent to an Appellate Court to consider the facts in evidence in the Section 110 record. In a recent case of this sort, No. 223, decided 27th July 1891, in which the Collector had acted mechanically as here, the facts in evidence were such as to reduce the guiltiness of the lambardar to a finding that his conviction was due to his unpopularity and intriguing nature. My view then of the law is that when there is only one conviction under Section 110, Criminal Procedure Code, against an office-holder, it is a question of fact which is to be decided by Collector and Appellate Court by consideration of all the facts in the criminal proceedings, whether the office-holder is or is not fit to be further retained as such. I decide that question in his favour when, except for some unsatisfactory intangible evidence, as in this case, and the other above quoted, the man has a clean record. Did one conviction under Section 110 carry with it the consequences applied by the Collector in this and other cases, proceedings under Section 11 would have to be very much more careful and searching than they are. Holding that the criminal proceedings in this case do not establish unfitness as contemplated under Rule 32 iii (a), I am regretfully constrained to accept this appeal and reversing the Collector’s order of dismissal to reinstate Lehna Singh as lambardar.”

When the preceding order reached the Collector, the Collector No. 365, dated 18th November 1891, addressed the following letter to the Commissioner: “I shall be obliged if you will be good enough to refer the case of Lehna Singh, lambardar of Chander, tahsil Raya, to the Financial Commissioner, that he may give a ruling on the Revision side on a most important point of law.

“2. Lehna Singh, after due enquiry in a Criminal Court, was held to be a habitual receiver of stolen property, and security for good behaviour was taken from him under the Code of Criminal Procedure. He appealed to me as District

“Magistrate and I dismissed his appeal. At the same time, as Collector, I ordered his dismissal from the post of lambardar.”

“When he appealed to you, you held that the enquiry in the criminal case had not been sufficient, and that Lehna Singh was probably not a receiver of stolen property. You therefore reinstated him in his post of lambardar.”

“3. The only course open to me is to ask you to forward the case to the Financial Commissioner in order that he may take it up on the Revision side. A most important principle is here involved, and I think it would be well if a ruling were obtained on it from the highest Revenue Court of the Province.”

“4. My opinion, which I urge with all due respect, is this, that the question whether Lehna Singh is or is not a receiver of stolen property is one which only the Criminal Courts are competent to decide.”

“A Revenue Officer, as such, has no jurisdiction to enquire into this point. In the present case, a competent Criminal Court decided the lambardar to be a receiver, and the Court of appeal upheld the decision. If he still wished the stigma attaching to him to be removed, it was open to him to apply to the Chief Court on the Revision side; this he did not do. I therefore urge that Lehna Singh must be held to have been judicially decided to be a receiver of stolen property. This being the case, he is unfit to remain any longer a lambardar.”

“5. I conceive that no one would for a moment hold that a receiver of stolen property should be allowed to hold the post of lambardar. The lambardar is the office bearer who is chiefly responsible for keeping down crime in his village, and it is manifestly inexpedient to allow a thief or a receiver of stolen goods to hold such an office. There are 4,708 lambardars in this district, many of them men of very small means. It has been found that in some villages the lambardars are the principal protectors of thieves. This is one of the reasons for the increase of crime in a district. In such cases, it is not sufficient to demand security from the thieves themselves; it is much more important to demand it from those persons who protect them and profit by their depredations, and who by virtue of their position are usually able to escape all punishment. A Collector is also a District Magistrate and it is his principal duty to keep down crime. The Commissioner has no connection with the supervision of

“ the criminal administration of a district, but if he is not prepared
 “ to support the Collector, so far as he can, in the dismissal of
 “ lambardars who are suspected of harbouring thieves, it will
 “ make the work of the Magistrate and Collector extremely diff-
 “ cult. The files are sent herewith.”

The case has now been considered by this Court on the Revision side in consequence of the following communication received from the Commissioner :—

“ At the request of Major Montgomery, Deputy Commis-
 “ sioner, Sialkot, I submit

No. 3273, dated 24th November 1891.
 No. 53, decided on 19th February 1891.
 Crown v. Lehna Singh. Proceedings
 under Section 110 of C. P. Code. Also
 Appellate file.

No. 371, decided on 7th May 1891
 dismissing Lehna Singh from the post
 of lambardar.

No. 270, decided on 17th August 1891,
 by Commissioner, Rawalpindi.

Appeal against case No. 371 above, as
 per vernacular chalan.

“ copy of his No. 365,
 “ dated 18th instant, and
 “ files marginally noted in
 “ original, for orders.

“ 2. Major Montgo-
 “ mery holds that an office-
 “ holder ordered under
 “ Section 110, Criminal
 “ Procedure Code, to find

“ security for good conduct is, *ipso facto*, unfit for office and must
 “ consequently be dismissed. I hold (see my judgment in case
 “ referred to, No. 270, dated 17th August 1891), that when
 “ there is only one conviction under Section 110, Criminal
 “ Procedure Code, against an office-holder, it is a question of fact,
 “ which is to be decided by Collector and Appellate Court by
 “ consideration of all the facts in the criminal proceedings,
 “ whether the office-holder is or is not fit to be retained as such.

“ 3. As showing the injustice which would sometimes
 “ result from mechanical dismissal, as contended for by the

No. 223, dated 27th July 1891, Basawa “ Deputy Commissioner,
 Singh v. Badhawa Singh. “ Sialkot, I submit file of
 “ appeal referred to in my judgment No. 270 against the le-
 “ gality of which Major Montgomery is making this reference.”

I am of opinion that when a lambardar has been ordered by a Magistrate to give security under Section 110, Criminal Procedure Code, and has failed, as Lehna Singh has failed, to get that order set aside either by the Magistrate of the District sitting as a Court of Appeal or the Chief Court as a Court of Revision, that lambardar is *prima facie* liable to dismissal from his office. In the present instance, Lehna Singh did not take the trouble to apply to the Chief Court for revision of the orders of the Criminal Courts, and these orders were still in force against him when the Commissioner dealt with the question of his fitness to continue as lambardar. When I

say that a lambardar, situated as Lehna Singh, is *prima facie* liable to dismissal, I do not mean that the Revenue authorities have no option in the matter and are absolutely bound to pass an order of dismissal, but I think those authorities would ordinarily fail in their duty if they retained such a lambardar in office unless he could show some very strong reason why he should not be removed. Now, the only reason urged by Lehna Singh against his dismissal in this case was that the orders of the Magistrates were erroneous and unjust: this reason, however, was not urged before a superior Criminal Court, but before the Revenue Commissioner, Mr. Thorburn. But Mr. Thorburn's order accepting the appeal appears to my mind to be of the nature of a judgment passed by a Court of criminal appeal, the question for decision being whether the Magistrates were right in their findings, and not whether, accepting those findings as the findings of competent Courts, Lehna Singh had shown that there was any special reason for retaining him in office. In short, the Commissioner has virtually retried the question of Lehna Singh's liability to furnish security under Section 112, Criminal Procedure Code, and seems to me practically to have taken upon himself the functions of a criminal appellate Court.

I am of opinion that this course was wrong, and that as Lehna Singh, by omitting to bring his case before the Chief Court, must be taken to have accepted the findings of the Criminal Courts against him, he was liable to be dismissed, and should be dismissed, inasmuch as he is unable to show any cause save his assertion of error on the part of the Criminal Court against that course. I therefore reverse the order of the Commissioner, dated 17th August 1891, and restore that of the Collector, dated 23rd March 1891.

In dealing with cases of this kind in future, I am of opinion that the Collector should not dismiss a lambardar from his office immediately after the rejection of his appeal from an order demanding security, but should suspend the lambardar and postpone the decision of the question of his dismissal or restoration to office until the lapse of a reasonable time, say six months, during which the lambardar would be able to take such steps as he might please to obtain the reversal or modification of the orders of the Magistrates. I have shown this judgment to my colleague and he has concurred in the views which I have expressed.

Commissioner's order reversed:

Collector's order restored.

No. 9.

HIRA,—APPELLANT,

Versus

WAZIRA,—RESPONDENT.

} APPELLATE SIDE.

Case No. 47 of 1890-91.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Lambardar—Claim to office of—Adopted son,—being also a sister's son.

The adopted son who was also a sister's son of the deceased lambardar, claimed to succeed to the vacant office.

The Financial Commissioner, after a remand for inquiry on the question of custom, declined to interfere with the order of the Commissioner in which that officer refused to appoint as lambardar the adopted son, such adopted son being the sister's son of the deceased and belonging to a different gôt.

Punjab Record, No. 14 of 1886, Rev., referred to.

Further appeal from the order of G. Smyth Esquire, Commissioner, Jullundur, dated 1st May 1891.

Nanak Bakhsh, for appellant.

Sarbadhicary, for respondent.

This was a contest for the office of lambardar in the village of Bolewal in the Gurshankar tahsil of the Hoshiarpur District.

The Collector (Lieutenant-Colonel H. M. M. Wood), appointed Hira, who was a sister's son and also the adopted son of Jauhri, the deceased lambardar. Wazira, the only other candidate for the office admitted the relationship alleged by Hira. The grounds of the Collector's appointment were that :
 "To all intents and purposes Hira is heir of the deceased
 "and is entitled to succeed to the lambardari. Even if the
 "adoption were not proved, I think that the status of the
 "deceased and the area of his land, to which Hira presumably
 "succeeds in default of the widow, some 254 kanals as against
 "the 20 kanals held by Wazira, would give him a superior
 "claim."

The Commissioner, on appeal, set aside the Collector's order and removed Hira. He said :

"The deceased lambardar and appellant are of the Bains
 "gôt of Jats and almost all the village proprietors belong to the
 "same gôt. The respondent (Hira) is by birth a Hir Jat : he
 "is the son of the sister of Jauhri, the deceased lambardar, and
 "has been adopted by Jauhri.

“ I do not think that a man belonging by birth to a strange
 “ gôt should be appointed lambardar in the village. There is
 “ no provision in the *Wajib-ul-ars* of the last settlement as
 “ regards succession to the lambardarship. In that of the first
 “ settlement, appointments could be made by election from the
 “ proprietors of the village in the event of a vacancy arising
 “ from a lambardar being dismissed or dying childless. The
 “ latter rule is not in force now and is not in accordance with
 “ Rule 34 (iii).”

Hira preferred a further appeal to the Financial Commissioner. He contended that (1) as the adopted son of the late lambardar and owner of 254 kanals of land he should be appointed ; (2) that having regard to character, influence and ability he was a fit and proper person to appoint ; and (3) that Wazira and others were related to the deceased in the fourth degree.

At the first hearing of the appeal, the Financial Commissioner directed a further inquiry as to the rights of the heir, and the custom of the village, by the following interlocutory order—

4th Decr. 1891.

FINANCIAL COMMISSIONER.—In disposing of this case I think that the Commissioner has hardly given sufficient weight to the decision No. 14 * *Punjab Record* for 1886, Rev., and to the rule that the heir who, according to the custom of the village, is entitled to succeed, should be appointed lambardar. The material on the record is insufficient to enable me to decide the points on which the case should turn. Those points are—

1. Is the appellant Hira, the heir of deceased Jauhri, by reason of his being his adopted son ?
2. If so, is Hira debarred by the custom of the village from succeeding to the lambardarship ?

These points should be investigated by the Tahsildar and findings recorded by him. The Deputy Commissioner and Commissioner should then express their opinions on these points and the case should be returned to this Court.

The Collector (Mr. E. B. Steedman) made the following return to the order of remand—

* In this case it was held that the claim of an adopted son to the office of lambardar should be recognized in cases in which such claim was not opposed to custom, and in which the adopted son was by birth a near kinsman of his adoptive father.

In accordance with the order of the Financial Commissioner, dated 4th December 1891, I herewith forward the report of the Tahsildar. It is very clear and full.

There is no doubt that Hira has succeeded as the adopted son to the property of the late lambardar, Jauhri, and is now in possession.

As to the second issue, I think that it is hardly possible to say that any custom exists. The appointment of lambardar dates from annexation, and in regard to this appointment, which is made by the Deputy Commissioner or Collector, it is difficult to see how a custom, properly so called, can have arisen. All that can be said, I submit, is that the Deputy Commissioner or Collector has customarily appointed a person of a certain defined status. This status has been defined by decisions and rules published by the Financial Commissioner, and in accordance with them appointments have been made. As a rule, in villages owned by Bains Jats, a Bains Jat is appointed lambardar. Two instances are given by the Tahsildar in which a Bains lambardar has not been appointed. This is, so far, in the appellant's favour.

I would also submit for the consideration of the Financial Commissioner that the judgments of his predecessors regarding the right of an adopted son to succeed, indicate that both Mr. Lyall and Colonel Wace were in no little doubt in the matter.

Where the adopted son is a near relation and of the same tribe, in such case and in such case only should he, I think, be allowed to succeed of right to the lambardari of his adoptive father to the exclusion of near collaterals. I think that immense harm might be done by allowing an adopted son belonging to another clan to succeed to the lambardar.

These adoptions are very often made to spite the heirs.

I do not think that a lambardar should be able to gratify private spite by imposing a lambardar on the village whom the villagers must dislike. Finally, I would note that if a lambardar was now being appointed for the first time, the claims of the adopted son of another gôt would hardly be listened to.

The Commissioner recorded the following opinion in returning the further enquiry—

The case given in *Punjab Record*, No. 14 of 1886, differs considerably from the present case in the fact that the adopted

son whose claim was conceded by Colonel Wace was the son of the brother of his adoptive father and therefore of the same gôt and very nearly related. In the present case, the man adopted is a sister's son and of a different gôt.

The adoption being admitted, the adopted son succeeds to his adoptive father's property, but still as a sister's son he is an outsider to the brotherhood, and his succeeding to the lambardarship would not be accepted as just.

The judgment of the Financial Commissioner was delivered as follows—

13th June 1892. FINANCIAL COMMISSIONER.—Having read the returns made by the Tahsildar, Deputy Commissioner and Commissioner, I am not prepared to interfere in the order of the Commissioner in which he refused to appoint, as lambardar, the adopted son of the late lambardar, such adopted son being the sister's son of deceased, and belonging to a gôt different from that of his adoptive father.

Appeal dismissed.

No. 10.

APPELLATE SIDE. {

SHER SINGH,—APPELLANT,

Versus

SUBHA,—RESPONDENT.

Case No. 48 of 1890-91.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Lambardar—Claim to office of—Adopted son,—being also a daughter's son.

The adopted son, who was also a daughter's son, of the deceased lambardar claimed to succeed to the vacant office.

The Financial Commissioner, after a remand for inquiry on the question of custom, declined to interfere with the order of the Commissioner in which that officer refused to appoint, as lambardar, the adopted son, such adopted son being the daughter's son of the deceased and belonging to a different gôt.

Punjab Record, No. 9 of 1892, Rev., referred to.

Further appeal from the order of G. Smyth Esquire, Commissioner, Jullundur, dated 15th April 1891.

Sarbadhicary, for appellant.

Golaknath, for respondent.

This was a case of rival claimants for the office of lambardar of Mauza Bhulana in tahsil and District Hoshiarpur.

Nihala and Subha were nephews of the deceased: Sher Singh was the grandson (daughter's son) of and was adopted by the deceased lambardar, who executed and registered a formal document evidencing the adoption.

The factum of the adoption was not denied by the nephews, but they contended that Sher Singh being a daughter's son was of a different gôt and ought not to succeed. The Collector (Lt.-Col. H. M. M. Wood) refused to accede to this contention. He said:

"The adoption may or may not be legally defective from the fact that Sher Singh is not of the same gôt as deceased, if such really be the case. But the adoption took place in the infancy of Sher Singh and he has lived with the deceased up to the time of his death, and has been regarded as his son and treated as such in all respects.

"Under these circumstances, Sher Singh is the proper person to succeed to the deceased lambardar and I appoint him accordingly."

The Commissioner (Mr. G. Smyth) remanded the case that the votes of the proprietors who paid their revenue through the deceased lambardar should be taken in regard to the rival claimants. He said:

"The respondent (Sher Singh) is the daughter's son of the deceased and belongs by birth to a gôt which has no other representative in the village. Appellant is the deceased's cousin and has a son. He alleges that the lambardarship has been in his family for several generations: on the other hand it is alleged that the appellant's family is the only one of that gôt in the village and that the constituents of his lambardarship are not men of one gôt but of various gôts.

"It appears to me *primâ facie* improper that the adopted son belonging to a gôt not previously present in the village should have the right to be introduced in the village as lambardar, but if there is any feeling or custom in the village to the contrary, this can be ascertained by the taking of votes."

The Revenue Extra Assistant Commissioner reported that the village was bhaiachara and had two lambardars, Bahadur, and Nodha deceased. The lambardars sometime ago divided the revenue payers between them,—Nodha having nine and Bahadur twenty-four holdings. Of Nodha's constituents, six including the appellant voted for the appellant (Subha) and three including the respondent voted for the latter (Sher

Singh). On the whole village, Subha had ten votes and Sher Singh eighteen.

As the appellant (Subha) had a majority of the votes of his own constituents and as Nodha's family had been in the village for four generations, the Commissioner reversed the order of the Collector and appointed Subha lambardar.

Sher Singh then presented a further appeal to the Financial Commissioner, who remanded the appeal for enquiry as to the custom, by the following interlocutory order—

4th Decr. 1891. FINANCIAL COMMISSIONER.—*Mutatis mutandis*, I make the same order as in the case No. 47 * of to-day's date, which is also from the Hoshiarpur District. In neither case has any proper enquiry in regard to the custom been made.

The Collector (Mr. E. B. Steedman) made the following return to the order of remand—

4th March 1892. This is a similar case to that of Mauza Bolewal.

The adopting father was a Bandhu Jat and the adopted son is a Khakh Jat. The proprietors are Bandhu Jats. The adopted son is a grandson on the daughter's side of the adopting father.

I can add nothing to what I have said in regard to the Bolewal case.

The Tahsildar has written a report at some length in which he gives as his conclusion, that adoption does not confer any right in regard to the office of lambardar.

The Commissioner recorded—

24th March 1892. I have nothing to add to the remarks made in the Bolewal case.

The judgment of the Financial Commissioner was delivered as follows—

13th June 1892. FINANCIAL COMMISSIONER.—This case is similar to No. 47 decided to-day and also comes from the Hoshiarpur District.

Having read the returns made by the Tahsildar, Deputy Commissioner and Commissioner, I decline to appoint the appellant to be lambardar in succession to his adoptive father. Appellant is daughter's son of the late lambardar and is of a different gôt.

Appeal dismissed.

* Punjab Record, No. 9 of 1892, Rev.

No. 11.

SUCHET SINGH,—APPELLANT,

Versus

BASANT SINGH,—RESPONDENT.

} APPELLATE SIDE.

Case No. 21 of 1891-92.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Lambardar—Claim to office of—Adopted son,—being also a sister's son.

The adopted son, who was also a sister's son of the deceased lambardar, claimed to succeed to the vacant office.

The Financial Commissioner declined to interfere with the order of the Commissioner setting aside the appointment of the adopted son, such adopted son being the sister's son of the deceased and belonging to a different gôt.

Punjab Record, Nos. 9 and 10, 1892, Rev., followed.

Further appeal from the order of G. Smyth Esquire, Commissioner, Jullundur, dated 3rd September 1891.

This was a case relating to rival claimants for the office of lambardar in the village of Daudpur, tahsil Samrala, in the Ludhiana District.

The Collector (Mr. W. Chevis) appointed Suchet Singh (appellant before the Financial Commissioner) for the following reasons—

“Suchet Singh is the sister's son and also the son by adoption of the deceased lambardar. The adoption is denied by Basant Singh, but his denial appears groundless as mutation of names was effected in Suchet Singh's favour on 17th November 1890, and no Civil suit has yet been filed to contest this order. Suchet Singh has inherited deceased's property and is therefore his heir. The next nearest relations are Sada Singh, Basant Singh and Atr Singh, who are descendants of the deceased's grandfather and the other two claimants are descendants of deceased's great grandfather. There are, in my opinion, no claimants near enough to disturb Suchet Singh's claim of relationship to deceased by adoption and by being his sister's son and of having inherited his property.

“Suchet Singh appears a fitting man in all respects, and I appoint him lambardar.”

The Commissioner (Mr. G. Smyth) cancelled this appointment and made Basant Singh lambardar. The Commissioner recorded that : “I am very doubtful of the propriety of appointing an adopted son in a village of this kind, where all the proprietors appear to belong to one tribe. It also seems doubtful

“who are the revenue-payers who paid through deceased
 “and whether all the claimants paid through him. To have a
 “claim to the lambardarship, the claimant must be a revenue-
 “payer through the lambardar vacated,”

* * * * *

“The appellant alleges that he is a revenue-payer who
 “paid through the deceased lambardar and respondent admits
 “that such is the case.

“The appellant is one of the descendants of Takht Mal,
 “and as many of such descendants exist, there is no need for
 “resort to election under the terms of the *Wajib-ul-arz* of the
 “regular settlement.

“The respondent is the sister's son of the deceased, and the
 “gôt of his natural father differs of course from that of the
 “rest of the village. If respondent, the adopted son of the
 “deceased lambardar, were related to the latter in the male line,
 “his adoption would no doubt strengthen his claim to succeed
 “the deceased in the lambardarship, but in the present case
 “the kindred in the female line is brought in, and in a village
 “where there is such a strong family connection between the
 “proprietors, I do not think a man belonging to a different
 “gôt ought to be appointed lambardar.”

Suchet Singh then preferred a further appeal to the Financial Commissioner, who dismissed the appeal in the following judgment—

13th June 1892.

FINANCIAL COMMISSIONER.—I am not prepared to interfere in this case,—see judgments in cases Nos. 9 and 10, *Punjab Record* 1892, Rev. The appeal is dismissed.

Appeal dismissed.

No. 12.

SHAH MUHAMMAD—APPELLANT,

Versus

DIWAN BAKSH—RESPONDENT.

Case No. 50 of 1891-92.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL
 COMMISSIONER.)

Lambardar—Claim to office of—Adopted son,—being also a brother's son.

The adopted son, who was also a brother's son of the deceased lambardar, claimed to succeed to the vacant office in preference to the son of an elder brother of deceased.

APPELLATE SIDE. {

Held, upholding the order of the Commissioner, that the adopted son being otherwise fit and being by birth a nephew of his adoptive father, had a preferential claim.

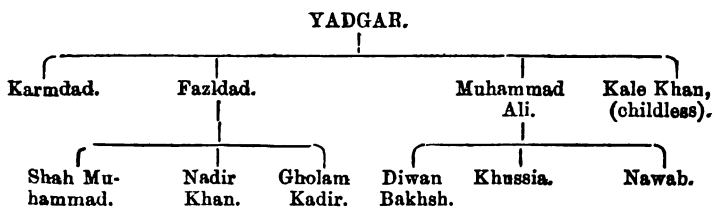
Punjab Record, No. 14 of 1886, Rev., followed.

*Further appeal from the order of S. S. Thorburn Esquire,
Commissioner, Rawalpindi, dated 21st January 1892.*

Oertel, for appellant.

This was a claim relating to the office of lambardar in the village of Bajra, Sialkot District. The post became vacant by the death of Kale Khan, who was lambardar, both adna and ala. He was responsible for Rs. 372-8-0 out of Rs. 708 revenue, and died childless, leaving an adopted son, Diwan Bakhsh (respondent).

The family tree was as follows—



The Settlement Collector (Capt. J. R. Dunlop Smith) appointed Shah Muhammad. His reasons were : “ Shah “ Muhammad certainly did not claim on Kale Khan’s appoint- “ ment and had the latter left any children, one of them would “ succeed : as it is the question now is—Has the adopted son “ preferential claim to a member of the elder branch in the “ direct line from Yadgar ? The property qualification of each “ claimant is practically the same.

“ The Commissioner has already ruled that an adopted son “ has no claim against a member of the elder branch.

“ I appoint Shah Muhammad to be adna and ala lambardar of Arazi Dost Muhammad, and to be adna lambardar in “ Khamra, Mahals Maira, Mahdowal, Pindi Bechiragh, Chak “ Shamir and Saidulapur.”

Diwan Bakhsh appealed to the Commissioner (Mr. S. S. Thorburn) who cancelled Shah Muhammad’s appointment. The Commissioner recorded :

“ The Settlement Collector puts the issue clearly, viz. : “ Has the adopted son (who is also a nephew of his adoptive “ father) preferential claim to a member of the elder branch

“in the direct line from Yadgar? He decides the question by finding that ‘the Commissioner has already ruled’ that an adopted son has no claim against a member of the ‘elder branch.’ Here the Settlement Collector refers to the 1884 proceedings. Now, a Commissioner, not being a final Court cannot give a ‘ruling’; moreover, if he could, the said ‘ruling’ would not prevail against the clear subsequent ruling of the Financial Commissioner, No. 14, *Punjab Record*, 1886, a case very analogous to this. Under that ruling, I find, answering the issue as framed by the Settlement Collector that the adopted son, being otherwise fit, does succeed, i. e. has the preferential claim. I therefore accept the appeal and appoint Diwan Bakhsh.”

Shah Muhammad preferred a further appeal to the Financial Commissioner contending that as he belonged to the elder branch of the family; had been adopted by Karmdad, the eldest brother in the family; and by custom, he had a preferential claim.

The Financial Commissioner dismissed the appeal by the following judgment—

14th July 1892.

FINANCIAL COMMISSIONER.—After consideration, I am of opinion that the Commissioner was right in this case in following the precedent No. 14, *Punjab Record*, 1886, Rev. The adopted son, who was brother's son to the late lambardar has been appointed in preference to the son of an elder brother. The appeal is rejected.

Appeal dismissed.

No. 13.

RAMJAS,—PETITIONER,

Versus

NIHALA,—RESPONDENT.

Case No. 116 of 1891-92.

(BEFORE G. R. ELSMIE, ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Lambardar—Claim to office of—Adopted son,—being also a brother's son.

The adopted son, who was also a brother's son of the deceased lambardar, claimed to succeed to the vacant office.

The Collector and Commissioner appointed the deceased's brother in preference to the adopted son.

The Financial Commissioner, upon application for revision, reversed these orders and appointed the adopted son, he being a brother's son and therefore of the same got as the deceased lambardar.

REVISION SIDE.

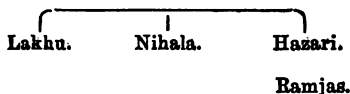
Petition for revision under Section 16, Punjab Land Revenue Act, 1887, of the order of G. Smyth Esquire, Commissioner, Jullundur, dated 30th October 1891.

Browne, for petitioner.

This was a contest for the office of lambardar in manza Pindori Atwalán, tahsil and District Hoshiárpur.

The question for consideration was whether an adopted son, who was also a nephew, was entitled to succeed to the lambardari in preference to the next brother of the deceased lambardar.

The parties were related thus—



Lakhu was the deceased lambardar. Ramjas was the nephew and adopted son of Lakhu. The Collector (Mr. E. B. Steedman) appointed Nihala lambardar.

The Commissioner (Mr. G. Smyth) upheld this appointment for the following reasons—

“Without going so far as to agree with the Collector in holding that an adoption by a lambardar of one of his male kindred does not give the latter a superior claim to the lambardarship over that derived from birth, I think in the present case, where the next brother to the deceased is present, it must be held that the latter is the next in succession for the lambardarship.

“The adoption no doubt entitles the adopted person to succeed to the property of the one who adopts him, but it does not alter the accident of the adopted person’s birth, and it has been ruled by the Financial Commissioner that the word ‘heir’ as used in Rule 34 does not necessarily mean the person entitled to succeed to the deceased’s private property—*vide Punjab Record*, No. 4 of 1889, Rev. I reject the appeal.”

Ramjas then applied to the Financial Commissioner on the Revision side. The Financial Commissioner reversed the order of the Collector and Commissioner and appointed the petitioner, Ramjas, the lambardar, he being the adopted son of, and belonging to the same gôt as, the deceased lambardar.

The judgment was as follows—

5th July 1892.

FINANCIAL COMMISSIONER.—In this case the appellant is the nephew, i. e., brother's son, and he is also the adopted son of the deceased lambardar. The Collector and Commissioner have disallowed his claim to succeed to the lambardarship, holding that deceased's brother, Nihala, who is older than appellant's father, has the better claim.

It seems to me that if ever an adopted son is to be allowed to succeed to a lambardarship, there could not be a stronger case than the present.

The Tahsildar thought the appellant's right had been made out and the precedent No. 14, Rev., *Punjab Record* for 1886, seems to be in point.

In several cases from the Hoshiarpur and Ludhiana districts, I have recently in concurrence with the local officers disallowed the claims of adopted sons to succeed, but the persons adopted belonged to different gôts from that of the adoptive fathers and in some instances there was doubt as to the validity of the adoption.

I accept this application and direct—reversing the orders of the Collector and Commissioner—that Ramjas be appointed lambardar in succession to the late Lakhu, his paternal uncle and adoptive father. No costs allowed.

Application allowed.

No. 14.

APPELLATE SIDE. {

NANDU AND OTHERS,—(PROPRIETORS),—
APPELLANTS,

Versus

MALLA SINGH,—(JAGIRDAR),—RESPONDENT.

Case No. 79 of 1890-91.

(BEFORE W. MACKWORTH YOUNG ESQUIRE, C.S.I., SECOND
FINANCIAL COMMISSIONER).

Punjab Land Revenue Act, 1887, Section 48, sub-section (2)—Collection of land revenue in cash or in kind—Right of jagirdar when, and when not, an owner in the estate.

The Punjab Land Revenue Act, XVII of 1887, contains a provision, viz., Section 48, sub-section (2) which did not form part of the old Revenue

Law (Act XXXIII of 1871), to the effect that "land revenue may be assessed in cash or in kind, or partly in cash and partly in kind, as the Local Government may direct."

According to the instructions issued by the Local Government (*cf. Punjab Record*, No. 2 of 1889, Rev.) a Settlement Officer is bound to assess every estate to a cash assessment, even when held in jagir, and to offer such settlement to the owners.

The only consideration which justifies the making of a settlement with a jagirdar is the fact of his being in some sense owner of the lands. The laxity which prevailed in the early days of Punjab administration in this respect is no longer permissible under the existing Revenue Law, which provides that every estate is to be assessed and the settlement offered to the owners.

If the estate is held in jagir by a jagirdar who is not the owner he is only entitled to the Government demand. If he has any rights of ownership, these rights are not affected by a re-assessment of the revenue, and under Section 61 of the Land Revenue Act, 1887, the settlement may (subject to Rule 208) be offered to him.

Collections of the Government revenue in kind are no longer permitted, but a jagirdar who is also proprietor, and who as jagirdar has permission (Rule 226) to collect the revenue assigned to him, may without impropriety be permitted to continue collections in kind, where these have been customary.

A jagirdar who is not owner, even if permitted to collect his revenue, must collect it from the headman empowered to collect it from the landowners (Rule 226) if such revenue is payable in cash.

Found, also, upon the evidence, that the respondent (the jagirdar) had not established any title to be considered the owner of the estate.

Further appeal from the order of G. Smyth Esquire, Commissioner, Jullundur, 5th August 1891.

Shircore and K. P. Roy, for appellants.

Rattigan, for respondent.

The dispute between the parties was whether at the present revised settlement of the Kangra District the land revenue should be assessed in cash or in kind.

The appellants before the Financial Commissioner were the proprietors and the respondent the jagirdar.

The Revenue Extra Assistant Commissioner was of opinion that a cash revenue should be fixed. He recorded his opinion as follows—

"As the jagirdar's rights are mortgaged to his creditor for a fixed time, the latter tries to make good his opportunity as much as he can and extorts grain from the proprietors to the utmost of his power. There is no doubt that the

“jagirdar will suffer by the payment being converted into cash, but he is entitled to receive only the Government share. At the new assessment the amount of the revenue payable to him should be fixed after taking this point into consideration so that the loss caused to him by the change may be made good.”

The Settlement Collector (Mr. E. O'Brien) agreed with the Extra Assistant Commissioner. He said: “I entirely agree with the view of the extra Assistant Commissioner: a cash revenue will be fixed when the new assessment is announced.”

The Commissioner (Mr. G. Smyth), upon appeal by the jagirdar, reversed this order, directing the payment in kind to continue. The Commissioner stated the grounds for his decision thus:

“That a cash assessment is desirable is apparent from the fact that the jagirdar has previously mortgaged his jagir revenues to a money-lender. The collection of revenue in kind by such an agency leads to suits of a harassing and exorbitant character. I note, however, from Mr. J. B. Lyall's order, dated 4th April 1866, that the respondents are not really cultivators but a family of Brahmans entitled only to *sermani*.”

* * * * *

“The order of Mr. Lyall, Settlement Officer, dated 4th April 1866 was obviously not before Mr. O'Brien when he passed orders in the case. In Mr. Lyall's judgment, the position of these Brahmans, who are recorded as proprietors, is fully discussed and their rights appear to amount to nothing more than to their taking from the cultivators one *ser* per maund and eight annas for every four rupees *sabti* rent taken by the jagirdar.

“In the case of such proprietors it does not appear proper to give the jagirdar only a cash assessment, and I accept the appeal, and, setting aside the Settlement Officer's order, maintain the arrangement previously in force.”

The proprietors preferred a further appeal to the Financial Commissioner who restored the order of the Settlement Collector fixing a cash revenue. The Financial Commissioner delivered the following judgment—

15th March 1892.

FINANCIAL COMMISSIONER.—This is an appeal against the order of the Commissioner of Jullundur reversing a decision by the Deputy Commissioner and Settlement Officer of Kangra, in

which the latter officer ruled that the appellants were entitled to claim that a cash assessment should be made of village Chinor in the Indaura taluqa, Kangra District, of which they are recorded proprietors, and respondent is jagirdar.

The case has been argued before me at length by the learned counsel. For appellants it is urged that certain precedents *Punjab Record*, Nos. 10 of 1886 and 4 of 1887, Rev., apply, and that no option is left to the Revenue Officers of Government to refuse to impose a cash assessment. The counsel for respondent relies on a decision by the Settlement Officer, dated 4th April 1866, as justifying the continuance of the existing practice of collecting the Government revenue in kind. He accepts the rulings quoted by the counsel for the appellants as applicable to a case in which the proprietors are in full cultivating possession and in full control of the village, but denies their applicability to the present case on two grounds, first, that the proprietors are not in this position; secondly, that the jagirdar has rights other than those of a mere jagirdar.

Colonel Wace's decisions were passed before Act XVII of 1887, the Punjab Land Revenue Act, became law. The present Act contains a provision (Section 48), sub-section (2) which did not form part of Act XXXIII of 1871, to the effect that "land revenue may be assessed in cash or in kind, or partly "in cash and partly in kind, as the Local Government may direct."

As explained, however, in *Punjab Record* No. 2 of 1889, Rev., a Settlement Officer is bound to assess every estate to a cash assessment, even when held in jagir, and to offer such settlement to the owners. Colonel Wace's decisions above quoted, as well as *Punjab Record* No. 4 of 1888, Rev., which was given after the Land Revenue Act of 1887 came into force, are applicable to the present state of the law.

The only consideration which justifies the making of a settlement with a jagirdar is the fact of his being in some sense owner of the lands. The laxity which prevailed in the early days of Punjab administration in this respect, is no longer permissible under the existing Revenue Law, which provides that every estate is to be assessed, and the settlement offered to the owners. If the estate is held in jagir by a jagirdar who is not the owner, he is only entitled to the Government demand. If he has any rights of ownership, those rights are not affected

by a re-assessment of the revenue, and under Section 61 of the Land Revenue Act the settlement may (subject to Land Revenue Rule, Part II, 208) be offered to him. Collections of the Government revenue in kind are no longer permitted; but a jagirdar who is also proprietor, and who as jagirdar has permission (Land Revenue Rule, Part II, 226) to collect the revenue assigned to him may without impropriety be permitted to continue collections in kind, where these have been customary. A jagirdar who is not owner, even if permitted to collect his revenue, must collect it from the headman empowered to collect it from the land owners (Rule 226) if such revenue is payable in cash.

It is clearly therefore of the first importance in this case to decide, whether the jagirdar is in any sense a proprietor and on this point the parties are at issue. The appellants claim full proprietorship and admit no such claim on the part of the respondent. The latter claims to have exercised all proprietary rights in the village, such as arranging for cultivation, &c. I do not find the authority for the Commissioner's statement that respondent admitted that he had no rights as *ala malik*. This is recorded in his first order but not alluded to further.

The settlement record shows appellants as owners and respondent as jagirdar. There is nothing on the face of it to support the claim of the latter to proprietary right. The collection of the Government demand in kind—a privilege enjoyed by many assignees since the Sikh time—has been repeatedly ruled not to establish such a claim. The *sérmani* and *zabt* rate recorded as *malikana* is enjoyed by appellants in all the village lands and the onus is on respondent to establish his claim to a position superior to that of mere jagirdar.

The Commissioner has taken the order of the Settlement Officer, Mr. J. B. Lyall, dated 4th April 1866, as affording the evidence sufficient to rebut the presumption of truth afforded by the settlement record. This order was not before Mr. O'Brien when he passed his order, and it demands the fullest consideration. It was passed on an application by appellants for a cash assessment, and it refused the application on the ground that appellants were getting their full rights, and that there was no reason for giving them more, while to change the mode of collection would inflict serious loss on respondent. The following portion of the order is the most important from respondent's point of view: "This *sérmani* is not a rent charge "gradually reduced to a very small figure owing to the extor-

“tion of inordinate land tax by Government, but it is a right which was fixed from the first at that figure, and which was freely assigned by the Rajas and others to certain individuals.

“I believe myself the original nature of such a charge was that of an allowance to a village official. However, very probably it, in course of time, owing to office being hereditary, got to be considered a proprietary allowance, and it was probably correct at former settlement to call the enjoyees of it proprietors, in default of other claimants with better title.”

Now, although these remarks somewhat minimize the position of appellants as proprietors, they do not suggest that respondent has any proprietary status. Moreover, in another part of the order the Settlement Officer recorded that respondent had not been long in possession as jagirdar,—not more than thirty-five years apparently. “However,” wrote Mr. Lyall, “I am of opinion the petition should be refused. Such an assessment would be a loss to defendant (respondent) in many ways, and very distasteful to him.” And then he proceeded to discuss the status of the proprietors as quoted above. In all this, I cannot find any recognition of the fact that the jagirdar was in any sense a proprietor. The position is not once suggested.

I have only to mention one other point, that is, the alleged agreement of 27th November 1888. This is not admitted by appellants and has been rejected by the Revenue Officers who investigated the case as obtained by undue influence. Mr. Lyall recorded that the jagirdar was “all powerful in the village” and it is clear from the reports that the proprietors are in a very down trodden condition. I do not consider the document worthy of much reliance. Two more such documents have been mentioned before me by respondent’s counsel. It is clear that respondent has been for some time attempting to establish documentary evidence of a status superior to that of mere jagirdar, and I cannot regard the registered deed as a *bonâ fide* agreement.

For the above reasons, I find that the respondent has not established any title to be considered the owner of the village, and that there is no reason why the Settlement Officer should not proceed to assess it in the ordinary course to a cash revenue and offer such assessment to the proprietors. The jagirdar will thenceforward be entitled to the cash assessment in lieu of the collections in kind now made by him on account of the

Government demand. This order does not of course preclude the jagirdar from establishing his claim to proprietary right in the Courts, or to any other rights which he may believe himself to possess. I request the Commissioner to consider the question whether, in consequence of this order, any recommendation for compensating the jagirdar will be necessary, and report accordingly.

The appeal is accepted: the order of the lower Appellate Court reversed: and the Settlement Collector's order of 28th October 1890 re-affirmed. Costs throughout to be borne by respondent.

Appeal allowed.

No. 15.

ARJAN SINGH,—APPELLANT,

Versus

SUCHET SINGH,—RESPONDENT.

Case No. 27 of 1891-92.

(BEFORE W. MACKWORTH YOUNG ESQUIRE, C.S.I., SECOND
FINANCIAL COMMISSIONER.)

Partition—Shamilat taraf and shamilat deh—Ala lambardar—Muafi land held by ala lambardar in which he had no proprietary right.

In a claim to partition certain shamilat taraf and shamilat deh land, it was sought to exclude the muafi land, which was shamilat taraf, held by the ala lambardar by virtue of his office and in which he had no proprietary right.

Held, that there was no reason for excluding this land from partition. This land was entered in the revenue records as common land of certain tarafs of the village and the records contained nothing which precluded the holding from being brought into partition.

Further appeal from the order of Lieutenant-Colonel J. B. Hutchinson, Commissioner, Lahore, dated 23rd November 1891.

This was an application for partition of 130 kanals 13 marlas of shamilat in taraf Khudo and 1,200 kanals of shamilat deh; also of 168 kanals of taraf Malkana and 18 kanals 12 marlas of taraf Bhabra in the village of Kahna Nau in the Lahore tahsil of the Lahore District.

Suchet Singh, the respondent, was the ala lambardar: he was not a proprietor in tarafs Khudo and Malkana, but he was in possession of certain muafi land belonging to these tarafs.

APPELLATE SIDE. {

Rai Arjan Das, Assistant Settlement Collector, refused to order the partition of the muafi land, giving his reasons as follows :—

“ If the co-sharers of the said tarafs wish to have the muafi land partitioned among themselves, they should first regularly evict the ala lambardar and then apply for partition. So long as the ala lambardar holds possession of their land, the partition cannot be effected.”

The co-sharers appealed to the Commissioner (Colonel J. B. Hutchinson), who reversed the Assistant Settlement Collector's order and ordered partition. The Commissioner proceeded thus—

“ The question is whether the land which is held by Suchet Singh (ala lambardar) as muafi on account of his holding the post of ala lambardar, shall be included in the partition or not. I have before me cases decided by Mr. C. M. Rivaz and Mr. Ogilvie in which this point is considered. Suchet Singh does not object to the partition of the shamilat deh in which he would get a share, but to the partition of the common lands of the two tarafs in which he has not a share. I see no reason why these lands should be excluded from partition. As ala lambardar, Suchet Singh was a tenant of the whole proprietary body; now by partition he will become the tenant of one or more of that body. If such persons wish to eject him they will have to proceed by notice or suit under the Tenancy Act.

“ The appeal is accordingly accepted and the whole lands in question will be included in the partition.”

Upon further appeal, the Financial Commissioner upheld the Commissioner's order, holding that there was no reason for excluding the muafi lands from partition.

The following judgment was delivered—

FINANCIAL COMMISSIONER.—After hearing the parties and referring to the records, I concur with the lower Appellate Court that there is no reason for excluding the lands held by appellant from partition. These lands are entered in the Records as common lands of certain tarafs of the village, and this entry is made in usual form in the column of proprietors. 13th April 1892.

In the column of cultivators, appellant is entered. His tenure is, therefore, *prima facie* according to the Settlement record, that of a tenant of the holding under the proprietors of

the taraf concerned. The appellant has no status in regard to this land except that which results from the action of Government at the Settlement of 1865 in placing him in possession. This action is described in a letter No. 31, dated 1st February 1890, from the Secretary to Government to the Secretary to the Financial Commissioner in the following terms—

“Sir James Lyall agrees with the local officers in considering that where the muafis were made in the shape of allotments of the village common land, the action of Government at the previous Settlement in putting the persons for the time being selected to fill the office of ala lambardar in exclusive possession of such allotment was probably *ultra vires*, and that from the date on which the new Settlement takes effect the Government must disconnect itself from this arrangement and leave the persons in possession to settle any disputes which may arise as to their rights by private arrangement with the co-proprietors.”

In view of this authoritative declaration of the views of Government, it is not open to the Revenue Officers to take any other view of the effect of the arrangements made in 1865. At all events, no claim to adverse possession can be based upon the intention of Government in regard to the holding, and as the Settlement Record as it stands contains nothing which precludes the holding from being brought into partition, the order of the lower appellate court must be upheld. As remarked by the Officiating Commissioner, this decision does not effect the appellant's possession as a tenant of the proprietary body.

I dismiss the appeal. No costs.

Appeal dismissed.

No. 16.

AZIMULLA AND ANOTHER,—(PLAINTIFFS).—

PETITIONERS.

Versus

JEHANGIR KHAN, AND ANOTHER,—(DEFENDANTS).—
RESPONDENTS.

Case No. 22 of 1890-91.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Revision—Material irregularity—Omission to consider provisions of the Tenancy Act, 1887, as affecting claim to occupancy rights.

A lower Court acts with material irregularity in disposing of a plaintiff's claim to occupancy rights without reference to the new Tenancy Act, XVI of 1887.

REVISION SIDE. }

In the Settlement Record of 1882, a Record compiled when the old Tenancy Act (XXVIII of 1868) was in force, the plaintiffs were apparently rightly recorded as being tenants-at-will, because they were not in 1868 the representatives of persons who had settled in the village with the founders (Section 5 (3), Act XXVIII of 1868).

Since 1882, however, the new Tenancy Act has been passed, Section 5, sub-section (1) (c), of which is much wider than Section 5 (3) of the old Act

The case remanded to the Commissioner for redicision accordingly.

Petition under Section 84, Punjab Tenancy Act, 1887, for revision of the order of Colonel L. J. H. Grey, C.S.I., Commissioner, Delhi, dated 16th July 1891.

Ishar Das, for petitioners.

Lachmi Narain, for respondents.

This was a suit in which the plaintiffs sought to contest a notice of ejectment and claimed occupancy rights in 85 bigas 13 biswas of land situate in Mauza Sainpal in the Sirsa tahsil of the Hissar District.

The First Court (Rai Achru Ram, Assistant Collector,) held that the plaintiffs had failed to establish a claim to occupancy rights and dismissed their suit, subject to the payment to them of Rs. 46 compensation.

The Collector (Mr. P. J. Fagan) held that the plaintiffs must be regarded as entitled to occupancy rights in the land in suit and decreed accordingly. His judgment proceeded thus—

“From the fact that the plaintiffs were recorded as occupancy tenants at the last Settlement, and at the previous Settlement in 1860 as occupancy tenants, of 117 bigas 8 biswas, it looks probable that their family was among the original settlers in the village. It is also admitted that the plaintiffs or their predecessors brought the land in suit under cultivation. The only question is whether they occupied it before October 1868.

* * * * *

“The fact is that the land in dispute was waste adjoining the plaintiffs’ occupancy cultivation, and they were permitted by the owner to break it up as they wished. He admits before me that they began breaking it up in Sambat 1919 (A. D. 1863) and said that they went on breaking it up till the Settlement of 1880. There is very little material for a discussion as to how much was broken up before 1868 and

"how much after. In Sirsa at last Settlement, many non-occupancy tenants received occupancy rights by the consent of proprietors (see para. 250, Settlement Report). The fact that such rights were not conferred might be taken as presumptive evidence that the breaking up of the land in suit was very recent at the time: however, the village being a zamindari one at that time, I do not think that such a presumption can be drawn. On the whole, I think, that the plaintiffs must be regarded as entitled to occupancy rights in the land in suit. They certainly broke up some of it before 1868, if not all, and in all probability were in occupation of the whole of it as far as it was capable of occupation. They apparently had control over it and could break it up or not as they liked."

The Commissioner (Colonel Grey) reversed the Collector's decree in the following judgment—

"The plaintiffs' agent can urge nothing not already brought forward in the Collector's judgment. * * * I think the arguments inadequate to invalidate the Settlement record. Appeal accepted."

The plaintiffs applied to the Financial Commissioner for revision. The Financial Commissioner accepted the application and remanded the case to the Commissioner for re-decision with the following directions—

4th April 1892.

FINANCIAL COMMISSIONER.—The Commissioner's judgment is materially irregular on more than one point. It appears that the first Court while dismissing the claim for rights of occupancy awarded compensation to the plaintiffs.

The Collector on appeal gave plaintiffs a decree for occupancy rights. The Commissioner on further appeal dismissed plaintiffs' claim *in toto*, saying not a word on the subject of compensation. The Commissioner's judgment is therefore irregular in that it fails to dispose of the question of compensation. If it be admitted that plaintiffs are not entitled to occupancy rights, there really seems to be no valid ground for omitting even to consider their claim to compensation. Then again I think it was irregular on the part of the Commissioner to dispose of the main claim to occupancy rights without any reference whatever to the new tenancy law. The Commissioner has dismissed the claim to occupancy rights on the strength of an entry in the Settlement Record of 1882,—

a record compiled when the former Tenancy Act of 1868 was in force. In that record, plaintiffs were apparently rightly recorded as being tenants-at-will, because they were certainly not in 1868 the representatives of persons who had settled in the village with the founders (see Section 5 (3) of Act 28 of 1868).

Since 1882, however, the new Tenancy Act has been framed, and Section 5 (c) of that Act is much wider than Section 5 (3) of the old Act, and there can be no doubt that if these tenants, or their representatives in interest, were settled by the founders and were in occupation of this land on the 21st October 1868 and have held it ever since, they are entitled to rights under Section 5 (c). Now, this is the point on which the Collector took evidence and which he decided in favour of plaintiffs. I must therefore accept this application, and with reference to the foregoing remarks and Judgment No. 7, *Punjab Record* for 1890, Revenue, request the Commissioner to decide the question of plaintiffs' claim to occupancy rights in accordance with the law as it now stands, and not on a presumption arising from an entry in a Settlement Record compiled when another tenancy law was in force. If the Commissioner should decide that plaintiffs are not entitled to occupancy rights, he should, in dismissing their claim to those rights, also adjudicate on the question of compensation. Parties to bear their own costs in this Court.

Application allowed.

No. 17.

LEKHA MAL AND ANOTHER,—(DEFENDANTS),—
PETITIONERS,

Versus

MUHAMMAD BAKHSH,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 123 of 1891-92.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Revision—Material irregularity—Granting decree for occupancy rights under Section 8, Punjab Tenancy Act, 1887, on vague and ill-considered grounds.

The lower Courts decreed the plaintiff rights of occupancy under Section 8, Tenancy Act, 1887, on vague grounds and without considering the test laid down in *Punjab Record*, No. 4 of 1875, Revenue.

Held, that this amounted to a material irregularity justifying the remanding of the case to the first Court for rediscision, after further inquiry if necessary.

Petition under Section 84, Punjab Tenancy Act, 1887, for revision of the order of Sardar Gurdial Singh, Collector, Muzaffargarh, dated 11th September 1891.

Amar Nath for petitioners.

The plaintiff sued to establish occupancy rights in 32 kanals, 5 marlas of land situate in mauza Kamal Korai, tahsil and District Muzaffargarh.

The first Court (Kazi Gholam Murtaza, Assistant Collector) gave the plaintiff a decree, apparently under Section 8 of the Tenancy Act of 1887.

The defendants appealed to the Collector (Sardar Gurdial Singh) who upheld the decree of the first Court. The grounds of his decision were stated thus—

“The plaintiff alleged that his father brought the land under cultivation and held it in continuous possession as an occupancy tenant; he claimed occupancy rights. The defendants alleged that the plaintiff had acquired possession under a mortgage and had had no possession previous thereto.

“It appears that Hassan, father of the plaintiff, held possession of the land and paid $2\frac{1}{2}$ seers per maund litch to the owner and paid the land revenue from Sambat 1914 or before. He also planted a garden which still exists.

“The defendants’ statement that the plaintiff acquired possession under a mortgage is thus clearly disproved. I think it is clear from the facts that the plaintiff and his father held the status of an occupancy tenant, and I believe that this is the conclusion arrived at by the lower Court which seems to me to be correct. I therefore uphold the decision of the lower Court and dismiss the appeal.”

The defendants applied to the Financial Commissioner for revision.

The Financial Commissioner remanded the case to the first Court in view to a fresh decision after further inquiry, if necessary. The Financial Commissioner delivered the following judgment—

5th April 1892.

FINANCIAL COMMISSIONER.—In this case the lower Courts appear to have given a decree for occupancy rights under Section 8 of the Tenancy Act on very slender grounds. The tenants are found to have held the land for a long time, to have broken up waste, and to have planted trees. The possession is held to have been since the commencement of British

rule. In going through the case, however, I cannot find any foundation for the view that facts such as those stated above have generally been held to enable a tenant in the Muzaffargarh District to become a tenant with rights of occupancy under Section 8. There is no evidence of a custom to this effect, nor have any precedents been quoted. There have not been many rulings under Section 8 of the present Tenancy Act, but under Section 8 of the old Act the Financial Commissioner held, *Punjab Record*, No. 4 (Revenue of 1875), that ordinarily a case would fall under Section 8 where a tenant could show that the right claimed had generally or customarily been conceded to other tenants similarly circumstanced. This I think is a very proper and sensible view, and I am of opinion that in the present case the granting of a decree for occupancy rights on very vague grounds, and without considering the test laid down in the judgment of 1875 (above quoted) amounted to an irregularity which justifies me in remanding the case to the first Court for fresh decision, after farther enquiry if necessary. I think that a decree for occupancy rights under Section 8 ought not to be given to this plaintiff unless he can prove that similar rights have been conceded to other tenants, the incidents of whose tenancies resemble his own.

Case remanded accordingly for rededecision. Costs in this Court to be borne by the parties.

Application allowed.

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No. 18.

CHAUGATTA,—(DEFENDANT),—APPELLANT,

Versus

NAND SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Case No. 2 of 1891-92.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER).

Village dues—Atrafi—Public policy.

The levy of atrafi from such persons as are liable to pay the same to the village proprietary body is not opposed to public policy.

Further appeal from the decrees of G. Smyth Esquire, Commissioner, Jullundur, dated 27th August 1891.

This was a suit by the proprietors of mauza Gholia Khurd, tahsil Moga in the Ferozepore District against a weaver, a

resident of the same village, for Rs. 3 on account of atrafi dues for three years.

The Collector (Colonel F. M. Birch) held that the levy of atrafi was repugnant to public policy and dismissed the suit.

The plaintiffs appealed to the Commissioner (Mr. G. Smyth) who decreed Rs. 2-4-0 in the plaintiffs' favour. His reasons were—

“ The plaintiffs' suit cannot be thrown out on the ground
“ that the levy of atrafi dues is repugnant to public policy.
“ The Chief Court has frequently decreed such dues, and the
“ rule which is ascertained from a perusal of the various
“ judgments of the Chief Court on this question is, that where
“ the levy of such dues is customary, the proprietors are entitled
“ to claim them.

“ That the levy of atrafi dues in this village is customary,
“ is shown by the entry in the *Wajib-ul-arz* of the regular
“ settlement in which the rates at which they are to be taken
“ are laid down. These rates are also repeated in the rubkar
“ of the revised Settlement, dated 11th May 1889. The pro-
“ prietors also have, on three occasions, obtained decrees for
“ such dues (the details are then given) ; hence the custom is
“ clearly established.

“ The defendant admits that he works as a weaver. As
“ such, he is liable to pay at the rate of 12 annas a year.

“ I accept the appeal and setting aside the order of the
“ Collector, pass a decree for Rs. 2-4-0 and costs in proportion.”

The defendant appealed to the Financial Commissioner, who, while agreeing with the Commissioner that the Collector's view as to the levy of atrafi being repugnant to public policy was erroneous, remanded the suit to the first Court to enable the defendant to prove his plea that he, personally, had never paid atrafi and was not liable to pay it. The judgment was as follows—

20th June 1892.

FINANCIAL COMMISSIONER.—In this case I agree with the Commissioner in the view that the Collector was wrong in dismissing the claim as being opposed to public policy, but I think the Commissioner should have remanded the case for retrial to the first Court, because the defendant has had no opportunity hitherto of proving what he undertook to prove in his written plea and what he has urged throughout, viz., that he personally has never paid atrafi and is not liable to pay it. The defendant did not plead that claims for atrafi could not be

heard in Revenue Courts at all, but that he personally was not liable. One of the reasons he gives is that he is the owner of his house, and that that fact is sufficient by custom to exempt him.

I accept this appeal and remand the case to the first Court for retrial after the proper issues have been fixed with reference to the pleas of the parties and full opportunity has been given for adducing evidence on both sides. Costs in this Court and in that of the Commissioner to be costs in the cause and to follow the event. I think the Collector might properly make over the case for disposal to the Revenue Assistant.

Appeal allowed.

— — —
No. 19.

GURDIT SINGH,—(DEFENDANT),—PETITIONER,

Versus

SARDAR JAWALA SINGH,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Case No. 6 of 1891-92.

(BEFORE G. R. ELSMIE ESQUIRE, FIRST FINANCIAL COMMISSIONER.)

Civil Procedure Code, Section 551—Dismissal of appeal for default—Fixing day for hearing appellant or his pleader.

The defendant filed an appeal in the Commissioner's Court. The practice of the Court was to permit appellants to deposit their appeals in a box.

The appellant's appeal was taken up several days after being so deposited, but the appellants to whom notice had not been given, not appearing, it was dismissed in default.

Held, that as required by Section 551, Civil Procedure Code, the Commissioner should have fixed a day for hearing the appellant or his pleader, and that the appeal must be remanded to him for rehearing.

Petition under Section 84, Punjab Tenancy Act, 1887, for revision of the order of Lieutenant-Colonel J. B. Hutchinson, Commissioner, Lahore, dated 27th November 1891.

This was a suit to recover Rs. 462-1-3 on account of produce.

The first Court (Lieutenant C. P. Egerton, Assistant Collector, Kasur), dismissed the plaintiff's suit with costs.

Upon appeal, the Collector (Colonel C. Beadon) remanded the suit for fresh decision.

The defendant appealed to the Commissioner (Lieutenant-Colonel J. B. Hutchinson) from this order of remand. On the 5th November 1891, the Commissioner dismissed the appeal for default by a vernacular order in which he recorded that : " This appeal was produced to-day for orders : it was found in " the petition box on the 17th October, but the appellant on " being called was not present. This was repeated on 19th " and 20th October, but the appellant was still absent, nor is " he present to-day. The appeal is accordingly dismissed in " default."

The defendant thereupon applied to have his appeal restored. This application was also rejected, the Commissioner recording that, " on 17th October last this appeal was deposited " in the appeal box. The appellant was regularly called on " the 17th, 19th, 20th October and up to the 5th November. " No one attended. The appeal was therefore dismissed in " default on that date. Application is now made for the appeal " to be brought on the file again.

" The application is refused for the following reasons—

" (1). The appeal when first filed was barred by limita-
" tion.

" (2). The appeal was not properly drawn up ; no copy of
" the first Court's order was filed and there was no
" attestation clause as required by law."

The defendant then applied to the Financial Commissioner for revision. The Financial Commissioner remanded the case to the Commissioner with directions to fix a date in accordance with the provisions of Section 551, Civil Procedure Code, and hear him in support of his appeal. The following judgment was delivered—

20th June 1892.

FINANCIAL COMMISSIONER. —I think the Commissioner committed a material irregularity in dismissing this appeal on default on the 5th November last. It appears that the petition of appeal was deposited in a box kept for the reception of petitions at the Commissioner's office. The petition was taken out of the box and the appellant was called on several occasions but did not appear.

There is however nothing to show that as required by Section 551, Civil Procedure Code, a date was fixed for the hearing of the appeal, and that appellant was duly warned to appear on that date.

Petitions of appeal are similarly received in a box in this Court, but appeals are never taken up for preliminary hearing save on formally fixed dates of which due notice has been given.

I must request the Commissioner to rehear the appeal to his Court after fixing a date and giving due notice to appellant.

Parties to bear their own costs of appeal in this Court.

Application allowed.

CHIEF COURT CIR. ORDERS,
1892.

CHIEF COURT CIRCULAR ORDERS.

CIRCULAR MEMO. No. 1—191 G.

To

ALL DIVISIONAL AND SESSIONS JUDGES, DISTRICT MAGISTRATES,
DISTRICT JUDGES AND JUDGES OF SMALL CAUSE COURTS
IN THE PUNJAB.

Dated 14th January 1892.

THE revised "statement showing the cost of Judicial Registers (Civil Criminal and common to both courts) printed at, and supplied by the Lahore Central Jail Lithographic Press," annexed hereto, is published in supersession of that contained in Appendix A to Book Circular No. XVII—3792 G., dated the 4th September 1890.

APPENDIX

Statement showing cost of Judicial Registers (Civil, Criminal and common to both)

1	2	3						
No. of Register.	Name of Register.	PAPER.						
		Description of paper.	Size of sheet.	Quantity of paper.		Rate per quire.		Cost of paper.
				Qrs.	Sts.	Rs.	A. P.	
CIVIL REGISTERS.								
I	Register of Civil suits	Badami	Full	4	0			0 13 8
II	" Miscellaneous cases cognizable only by principal courts of original jurisdiction.	Royal.	"	2	0			0 6 10
III	" Divorce and matrimonial cases ...	"	"	2	0			0 6 10
IV	" Cases under the Land Acquisition Act.	"	"	2	0			0 6 10
V	" Probates, &c.	"	"	1	0			0 3 5
VI	" Miscellaneous petitions and applications.	"	Half	1	0			0 3 5
VII	" Applications to sue or appeal as a pauper.	"	"	0	12			0 1 9
VIII	" Rejected and returned plaints and memoranda of appeal.	"	"	0	12			0 1 9
IX	" Dates fixed for trial of suits and appeals.	"	"	3	0			0 10 5
X	" Execution of decrees	"	Full	4	0			0 13 8
XI	" Objections in cases of execution of decrees.	"	Half	0	12			0 1 9
XII	" Applications for review of judgment.	"	"	0	12			0 1 9
XIII	" Appeals from decrees	"	Full	2	0			0 6 10
XIV	" Miscellaneous appeals	"	"	2	0			0 6 10
XV	Recordkeeper's General Register of suits and appeals disposed of.	"	"	6	0			1 4 6
XVI	Register of Judgment-debtors confined in execution of decrees.	"	Half	0	12			0 1 9
XVII	" Persons punished for contempt of Court.	"	"	0	12	0 3 5		0 1 9
XVIII	" Payment of stamp duties and penalties.	"	"	0	12			0 1 9
XIX	" Court-fees realized daily	"	"	0	12			0 1 9
XX	" Fines imposed on ministerial officers	"	"	0	12			0 1 9
XXI	" Peons	"	Full	2	0			0 6 10
XXII	" Property made over to the custody of Lambardars.	"	Half	0	12			0 1 9
XXIII	" Process fees and diet-money of witnesses.	"	"	3	0			0 10 5
XXIV	" Witnesses attending civil courts	"	"	1	0			0 5 5
XXV	" Processes served by each peon ...	"	"	1	0			0 5 5
XXVI	" Documents returned... ..	"	"	0	12			0 1 9
CRIMINAL REGISTERS.								
I A	Register of Cognizable offences instituted on complaint or on the motion of Magistrate.	Badami	Full	4	0			0 13 8
I B	" Cognizable offences reported by the Police under Sections 157 and 173 of the Criminal Procedure Code.	Royal.	"	4	0			0 13 8
I C	" Non-cognizable offences	"	"	4	0			0 13 8
II	" Cases under the Indian Penal Code ..	"	"	4	0			0 13 8
III	" Cases under the special or local laws.	"	"	2	0			0 6 10

A.

courts) printed at and supplied by the Lahore Central Jail Lithographic Press.

4					5			6			7			8			9	10
PRINTING.								Cost of heading to each Register.			Cost of ruling.			Cost of each Register (total of columns 3, 5, 6 and 7).			Remarks.	No. of Register.
Number of forms.	Number of pages.	Total number of pages charged for.	Rate per hundred pages.		Cost of printing.		Binding.		Rs.		Rs.		Rs.		Rs.			
			Rs.	A P	Rs.	A P	Rs.	A P	Rs.	A P	Rs.	A P	Rs.	A P	Rs.	A P		
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			Board	I
50	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	7 4			"	II
50	2	200	1	8 0	3	0 0	0	8 8	0	12 0	2	0 0	3	1 6			Cloth	III
50	2	200	1	8 0	3	0 0	0	8 8	0	12 0	2	0 0	3	1 6			"	IV
25	2	200	1	8 0	3	0 0	0	8 8	0	12 0	2	0 0	2	14 1			"	V
50	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	12 8			Board	VI
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			"	VII
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			"	VIII
150	2	400	0	12 0	3	0 0	0	9 0	0	12 0	2	0 0	3	5 3			"	IX
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			"	X
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			"	XI
25	2	200	0	12 0	1	8 0	0	4 6	0	12 0	1	0 0	1	8 3			Cloth	XII
50	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	7 4			Board	XIII
50	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	7 4			"	XIV
150	2	400	1	8 0	6	0 0	0	14 6	0	12 0	4	0 0	6	5 0			"	XV
25	2	200	0	12 0	1	8 0	0	4 6	0	12 0	1	0 0	1	8 3			Cloth	XVI
25	2	200	0	12 0	1	8 0	0	4 6	0	12 0	1	0 0	1	8 3			"	XVII
25	2	200	0	12 0	1	8 0	0	4 6	0	12 0	1	0 0	1	8 3			"	XVIII
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			Board	XIX
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			"	XX
50	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	7 4			"	XXI
25	2	200	0	12 0	1	8 0	0	4 6	0	12 0	1	0 0	1	8 3			Cloth	XXII
150	2	400	0	12 0	3	0 0	0	9 0	0	12 0	2	0 0	3	5 3			Board	XXIII
50	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	12 8			"	XXIV
50	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	12 8			"	XXV
25	2	200	0	12 0	1	8 0	0	7 3	0	12 0	1	0 0	1	11 0			"	XXVI
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			Board	I A
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			"	I B
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			"	I C
100	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	14 2			"	II
50	2	200	1	8 0	3	0 0	0	14 6	0	12 0	2	0 0	3	7 4			"	III

APPENDIX

1	2	3												
No. of Register.	Name of Register.	PAPER.												
		Description of paper.	Size of sheet.	Quantity of paper.		Rate per quire.		Cost of paper.						
				Grs.	Sta.	Rs.	A	P	Rs.	A	P			
IV	CRIMINAL REGISTERS.—concluded. Register of Miscellaneous criminal cases ...	Royal	Half	1	0									
V	" Cases decided in each court ...	"	Full	4	0									
VI	" showing the number of offences reported and brought up for trial, and of persons discharged.	"	"	2	0									
VII	" of cases tried by District Magistrates under Section 30, Criminal Procedure Code.	"	"	1	0									
VIII	" of Sessions trials ...	"	Half	0	12									
IX	" Trial of European British subjects (for District Courts).	"	"	0	12									
X	" Trial of European British subjects (for Sessions Courts).	"	"	0	12									
XI	" Complaints against or enquiries into conduct of Government officials.	"	"	0	12									
XII	" Appeals in criminal cases ...	"	"	1	0									
XIII	" Dates fixed for trial of criminal cases.	"	"	1	0									
XIV	" Prisoners under trial ...	"	"	1	0									
XIVA	" Prisoners admitted and removed from the lock-up.	"	Full	2	0									
XV	" Witnesses attending criminal courts.	"	Half	1	0									
XVI	" Court-fees realized daily ...	"	"	0	12									
XVII	" Fines ...	"	Full	1	0									
XVIII	" Fines realized ...	"	Half	0	12									
XIX	" Unexpired sentences ...	"	Full	2	0			0	3	5				
XX	Recordkeeper's General Register ...	"	"	6	0									
COMMON TO BOTH COURTS.														
A	Register of Receipts of deposits ...	"	Full	1	0									
B	" Repayments on account of deposits	"	"	1	0									
C	" General receipts and deposits ...	"	Half	0	12									
D	" Contingent expenditure in Judicial Department.	"	"	0	12									
E	" Files taken from record room ...	"	"	0	12									
F	" Applications for copies (both English and Vernacular).	"	Full	2	0									
F2	" Copyists (English only) ...	"	"	2	0									
G	" Miscellaneous proceedings received from other courts.	"	"	1	0									
H	" Despatch of packets and letters.	"	Half	0	12									
I	" General orders issued in Judicial Department.	"	"	0	12									
J	" Property received in Nazir's store-room.	"	Full	1	0									
K	" Government employés ...	"	"	1	0									
L	Character Book ...	"	"	1	0									
M	Register of petition-writers ...	"	Half	1	0									

NOTE.—Extra copies of headings can be supplied.
Ditto ditto ditto

A—concluded.

4					5			6			7			8			9		10			
PRINTING.								Cost of heading to each Register.			Cost of ruling.			Cost of each Register (total of columns 3, 5, 6 and 7).					No. of Register.			
Number of forms.	Number of pages.	Total number of pages charged for.	Rate per hundred pages.			Cost of printing.			Binding.									Remarks.				
			Rs.	A	P	Rs.	A	P	Rs.	A	P	Rs.	A	P	Rs.	A	P					
50	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	12	8	Board	IV
100	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	14	2	"	V
50	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	7	4	"	VI
25	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	3	11	"	VII
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	VIII
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	IX
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	X
25	2	200	0	12	0	1	8	0	0	4	6	0	2	0	1	0	0	1	8	3	Cloth	XI
50	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	12	8	Board	XII
50	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	12	8	"	XIII
50	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	12	8	"	XIV
50	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	7	4	"	XIVA
50	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	12	8	"	XV
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	XVI
25	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	3	11	"	XVII
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	XVIII
50	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	7	4	"	XIX
150	2	400	1	8	0	6	0	0	1	0	0	0	2	0	4	0	0	6	6	6	"	XX
25	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	3	11	"	A
25	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	3	11	"	B
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	C
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	D
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	"	E
50	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	7	4	"	F
50	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	7	4	"	F2
25	2	200	1	8	0	3	0	0	0	8	5	0	2	0	2	0	0	2	14	1	Cloth	G
25	2	200	0	12	0	1	8	0	0	4	6	0	2	0	1	0	0	1	8	3	"	H
25	2	200	0	12	0	1	8	0	0	7	3	0	2	0	1	0	0	1	11	0	Board	I
25	2	200	1	8	0	3	0	0	0	14	6	0	2	0	2	0	0	3	3	11	"	J
25	2	200	1	8	0	3	0	0	0	8	5	0	2	0	2	0	0	2	14	1	Cloth	K
25	2	200	1	8	0	3	0	0	0	8	5	0	2	0	2	0	0	2	14	1	"	L
50	2	200	0	12	0	1	8	0	0	7	3	...	...	...	...	...	...	2	2	8	Board	

full sheet, at Rs. 4 per 100 copies.
half sheet, at Rs. 3 do.

No. 203G., dated the 16th January 1892.

To be substituted for the corresponding Schedule attached to Book Circular XXI of 1890.

This takes the place of Appendix II, Part C., of the Vol. of Judicial Circulars.

SCHEDULE.

DISTRICT COURTS.

Maximum scale of Process-serving Establishment in each District of the Punjab to be entertained from 1st January 1891, subject to the carrying out of the new system of serving processes.

DISTRICTS.	Allowances to European Bailiffs.			District Nazirs on Rs. 25.			First Grade Civil Nazirs on Rs. 25.			Second Grade Civil Nazirs on Rs. 20.			Naib-Nazirs on Rs. 15.			Madad Muharrirs for Sadr Munsifs' Courts and Munsifs named at foot on Rs. 10.			Madad Naib-Nazirs for outlying Courts on Rs. 10.			Execution Bailiffs on Rs. 8.			Process-servers on Rs. 6.			Process-servers on Rs. 5.			Maximum cost per mensem.		
	Rs.																															Rs.	
Delhi	...	1	60	1	1	...				6	1	...		4		25	25														517		
Gurgaon		1	...	1				2	...	1	2	11	11																222		
Rohtak		1	...	1				3	1	2	2	13	13																279		
Karnal		1	...	1				3	...	2	2	19	19																335		
Umballa	...	1	50	1	1	...				7	2	5	5	40	40																755		
Ludhiana		1	1	...				7	2	2	3	26	26																505		
Simla	...	1	80	1	...	1				2	...	...	2	8	8																250
Jullundur	...	1	15	1	1	...				10	3	3	5	45	45																810		
Hoshiarpur		1	1	...				9	2	3	5	55	55																880		
Kangra		1	...	1				3	1	4	2	35	35																541		
Kulu				1	...	...	1	9	9																122		
Amritsar	...	1	20	1	1	...				12	3	...	5	50	50																870		
Gurdaspur	...	1	12-8	1	1	...				10	†3	1	4	42	42																746-8		

* One at Dalhousie, for six months only, at Rs. 25 per mensem.

† Two for the Munsifs' Courts at Batala.

Maximum scale of Process-serving Establishment, &c.—continued.

DISTRICTS.		Allowance to European Bailiffs.	District Nazirs on Rs. 25.	First Grade Civil Nazirs on Rs. 25.	Second Grade Civil Nazirs on Rs. 20.	Naib-Nazirs on Rs. 15.	Madad Muharrirs for Sadr Munsifs' Courts and Munsifs named at foot on Rs. 10.	Madad Naib-Nazirs for outlying Courts on Rs. 10.	Execution Bailiffs on Rs. 8.	Process-servers on Rs. 6.	Process-servers on Rs. 5.	Maximum cost per mensem.
		Rs.										Rs.
Sialkot	...	1 10	1	1	...	13	2	2	5	40	40	775
Gujranwala	...	...	1	...	1	6	1	2	3	35	35	574
Lahore	...	1 150	1	1	...	11	*2	1	5	43	43	908
Ferozepore	...	...	1	1	...	8	2	2	5	38	38	668
Hissar	...	...	1	1	...	4	1	...	3	17	17	331
Mooltan	...	1 50	1	1	...	5	2	4	3	24	24	523
Jhang	...	...	1	...	1	3	1	2	2	20	20	356
Montgomery	...	...	1	...	1	2	1	3	2	19	19	340
Muzaffargarh	...	...	1	...	1	4	1	3	2	23	23	414
Jhelum	...	1 15	1	...	1	6	1	3	4	28	28	530
Gujrat	...	...	1	...	1	5	1	2	3	25	25	449
Rawalpindi	...	† 262-8	1	1	...	10	2	6	5	40	40	822-8
Shahpur	...	...	1	...	1	4	1	2	3	23	23	412
D. I. Khan	...	...	1	...	1	6	1	4	3	35	35	594
D. G. Khan	...	...	1	...	1	5	1	3	3	30	30	514
Bannu	...	...	1	...	1	5	1	3	3	23	23	437
Peshawar	...	1 50	1	1	...	7	1	5	4	23	23	550
Hazara	...	...	1	...	1	2	...	2	1	16	16	279
Kohat	...	...	1	...	1	2	...	...	1	12	12	215
Total	...	18	31	14	17	183	40	72	102	892	892	
Cost per mensem	...	575	775	350	340	2,745	400	720	816	5,352	4,460	16,533

* One for the Munsif's Court at Kasur.

† One for Murree, for six months only, at Rs. 25 per mensem; one for Rawalpindi on Rs. 50 per mensem.

Special Establishment paid from Process fees for Settlement Courts.

DISTRICT.	Naib-Nazir on Rs. 15.	Process- servers on Rs. 6.	Process- servers on Rs. 5.	Cost p e r mensm.	REMARKS.
				Rs.	
Gujranwala	3	12	78	

GENERAL LETTER No. 249 G. of 1892.

To

ALL DIVISIONAL AND SESSIONS JUDGES IN THE PUNJAB.

Dated 19th January 1892.

THE Judges have observed that many copies of both Civil and Criminal Judgments which come up from Divisional Courts on appeal, are not clearly written, or are made in such faint ink that it is often very difficult and, indeed, sometimes almost impossible to read them. This causes inconvenience and frequently involves great waste of time. They accordingly request that Divisional Judges will see that copies of Judgments of their Courts supplied are distinctly and legibly written.

CIRCULAR MEMO No. 2—312 G. of 1892.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 26th January 1892.

THE annexed copy of Government of India letter No. $\frac{2}{6}$, dated the

Mode of issue of Com-
missions of Request for
execution by foreign Courts
on the Continent of Europe.

13th January 1892 (Home), regarding the mode
Judicial
of issuing Commissions of Request for execution by
foreign Courts on the Continent of Europe, is circulated
for information and guidance of all civil courts.

No. $\frac{2}{6}$ Judicial, dated Calcutta, the 13th January 1892,

From—J. P. HEWETT, Esq., C. I. E., Deputy Secretary to the Government of India.

To—The Chief Secretary to the Government of the Punjab.

Home Department.

Judicial.

I AM directed to state, for the information of his Honour the Lieutenant-Governor that Her Majesty's Secretary of State has expressed a desire that Commissions of Request issued in India for execution by foreign Courts on the Continent of Europe should not be addressed direct to such Courts or to the British Ambassador, but should in all cases be forwarded to the India Office for transmission through the Foreign Office to the country concerned. I am to request that, with the permission of His Honor the Lieutenant-Governor, the Judges of the Chief Court may be requested to follow the procedure suggested by the Secretary of State.

CIRCULAR MEMO. No. 3—350 G. of 1892.

To

ALL CRIMINAL COURTS IN THE PUNJAB.

Dated 29th January 1892.

THE annexed copy of Punjab Government Circular No. 2—35, dated the 21st January 1892, laying down that requisitions sent by Deputy Commissioners to the Resident of Kashmir for the surrender of accused persons should in all cases take the form of an official letter, which should clearly set forth the offence with which the accused persons are charged, and also indicate the section of the Indian Penal Code which is appropriate to that offence, is circulated for information and guidance, in

SUBJECT.

Arrangements existing between the British Government and the Kashmir State for the extradition of offenders, and regarding extradition of offenders generally.

continuation of this Court's Book Circulars Nos. V and VI of 1891.

Circular No. 3, dated Lahore, 21st January 1892.

From—H. C. FANSHAW, Esq., Offg. Chief Secy. to Govt., Punjab and its Dependencies,
To—All Commissioners and Deputy Commissioners in the Punjab.

Foreign.

Native States.

In continuation of this Government's Circular No. 6—215, dated April 21, 1891, regarding the extradition arrangements existing between the British Government and the Kashmir State, I am directed to request that requisitions sent by Deputy Commissioners to the Resident of Kashmir for the surrender of accused persons may in all cases take the form of an official letter, which should clearly set forth the offence with which the accused persons are charged, and also indicate the section of the Indian Penal Code which is appropriate to that offence. This letter should be invariably accompanied by *prima facie* evidence of criminality referred to in paragraph 4 of this Government's previous Circular.

2. The particular attention of all Deputy Commissioners is requested to the instructions laid down in these Circulars, as a failure to comply with them will inevitably result in unnecessary references and cause delay in the extradition proceedings.

CIRCULAR MEMO. No. 4—822 G. of 1892.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 20th February 1892.

WITH reference to the instructions contained in Judicial Circular No. V (b), at pages 40 to 42 of the volume of Judicial Circulars, 3rd edition, as to the speedy disposal of litigation in which officers or soldiers of the Native Army are concerned, the Judges, at the desire of the Government of India, are pleased to direct that reservists are, for the purposes of the instructions in question, to be considered as officers or soldiers, as the case may be, of the Native Army.

SUBJECT.

Reservists to be considered as soldiers of the Native Army for the purposes of the instructions contained in Judicial Circular No. V (b).

2. Attention is invited to the fact that paragraphs 1714, 1715, 2861—2871 of the Army Regulations, India, Volume II, Discipline, take the place of the paragraphs of the Bengal Army Regulations published at pages 41 and 42 of the volume of Judicial Circulars; they are here republished for convenience of reference.

Paragraphs 1714, 1715, 2861—2871 of the Army Regulations, India, Volume II, Discipline.

1714. No leave is to be granted to or applied for, on behalf of any native officer or soldier for the purpose of prosecuting a claim, or defending a suit, in any Civil Court, until some of the particulars of the claim or suit have been elicited, and until, the Commanding Officer of the Regiment shall have satisfied himself that the man's presence is absolutely necessary, it being borne in mind that there are probably very few native officers or soldiers who have not some near relatives at home capable of acting as their representatives.

1715. In the first instance, no more leave is to be granted to any applicant than will suffice to enable him to reach the place where the suit is to be heard, to remain there for ten days, and to rejoin his regiment; but should the Civil officer certify that the man's continued presence is required, additional leave is to be granted to him to such extent as the Civil officer may notify to be absolutely necessary. No second leave is to be granted to the same applicant on the same ground without a previous reference to the Civil officer (para. 2862, Section XXVII).

2861. All suits in Civil Courts for the prosecution or defence of which persons in the service of Government, officers of the Army or soldiers have obtained leave of absence, shall be disposed of by such courts as soon as they are ripe for hearing, irrespectively of the order in which they may stand in the register, and as speedily as may be consistent with the due administration of justice.

2862. If a case cannot be brought to a decision previous to the expiration of the leave of absence, the Civil officer before whom the suit may be depending is vested with a discretionary power to grant such extension to the native officer or soldier as may admit of an official reference being made to the Commanding Officer of his corps, to ascertain whether the leave can be prolonged for any further specific period.

2863. Whenever a native officer or soldier may obtain leave of absence for the purpose of instituting or defending a Civil suit, he may be furnished by his Commanding Officer with an official letter addressed to the Civil officer of the court in which the suit is to be tried, stating the extent of leave and purposes for which it has been granted. The letter should not give cover to any petition or statement in explanation of the merits or circumstances in question, and it must be presented in person.

2864. In every case when a native officer or soldier may not be able to obtain leave of absence, he may authorize any member of his family or any other person to commence, conduct, and manage the suit or the defence, as the case may be, in his stead. The authorisation may be in the following form on unstamped paper :—

Whereas I (name) inhabitant of villages, parganah
in the district of , son of
of the caste of , at present (rank) in
Company , Regiment , stationed
at , having occasion to institute (or defend) an action
for (nature and object of suit and name of adverse party) do hereby nominate and appoint (name
residence, caste and relationship, if any) to be my attorney, and I bind myself to abide by what-
ever he the said attorney may do in my behalf in the prosecution (or defence) of the said suit.
The said attorney will either prosecute (or defend) the suit in person, or will appoint one or more
of the authorized vakils of the court to prosecute (or defend) the same, under the instructions of
the said attorney, as he may think proper. In the event of an appeal being preferred from the judg-
ment passed in the suit, the said attorney is hereby further empowered to act for me on the
appeal in like manner as on the original suit.

2865. The authority is to be in writing, and is to be signed by the officer or soldier in the presence of his Commanding Officer, who will countersign the same and forward it to be filed in the court where the case is to be tried. When so filed, the countersignature of the Commanding Officer will be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

2866. Any person who may be authorized by an officer or soldier to prosecute or defend a suit in his stead is competent to prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader of the court to prosecute or defend the suit on behalf of such officer or soldier. And all notices or processes relative to the suit which may be served upon any person who is so authorized by an officer or soldier, or upon

any pleader who may be appointed by such person to act for or on behalf of such officer or soldier are as effectual for all purposes relative to the suit as if the same had been served on the party in person or on a pleader appointed by him.

2867. The foregoing three paragraphs are, with slight variations, for which section 465 of the Civil Procedure Code may be referred to, applicable to the case of any British officer or soldier actually serving the Government in any military capacity who may be a party to a suit and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person.

2868. Whenever a suit is instituted in any court against a native officer or soldier, a copy of the summons is to be forwarded to the Commanding Officer to be dealt with as required by paragraph 2850, and in the event of authority being granted for another person to conduct the defence, such authority is to be appended to the copy of the summons returned to the Court.

2869. Commanding Officers are to promptly acknowledge the receipt of all notifications from Civil officers regarding cases in court, and to specify the date on which they were communicated to the parties concerned, or the circumstances which may have rendered such communication impracticable.

2870. Commanding Officers should forward, under their countersignature, to the Civil officer concerned, all petitions from native officers and soldiers under their command regarding claims to land or other matters, abstaining, when so doing, from entering in any way into the merits of the case; it being left to the Civil officer to pass such orders as he may consider necessary, either for the disposal of the petition, or in directing the petitioner to prosecute his claim like any other complainant.

2871. Correspondence with the Civil authorities regarding the merits of any judgment order passed by them in the discharge of their official duty is prohibited.

ADDENDA ET CORRIGENDA TO CHIEF COURT CIRCULARS.

The 25th February 1892.

No. 927 G.—Add the following to List A, Part IV, of Book Circular No. XII—3109 G., dated the 8th July 1890:—

“Science of Jurisprudence, by Mr. W. H. Rattigan.”

CIRCULAR MEMO. No. 5—1117 G. of 1892.

To

ALL DIVISIONAL AND DISTRICT JUDGES IN THE PUNJAB.

Dated 11th March 1892.

SUBJECT.

Channel through which gratuity and pension applications should be submitted to Accountant-General.

THE annexed copy of correspondence regarding the channel through which pension and gratuity applications of persons employed in the ministerial establishments of the judicial department should be submitted to the Accountant-General, Punjab, is circulated for information and guidance.

2. It will be observed that such applications are in future to be submitted through Divisional Judges direct to the Accountant-General, Punjab. These instructions are limited to establishments not falling under the orders of Government contained in Punjab Government Proceedings No. 1630, dated the 9th August 1891, and Circular Memo. No. 22—4771 G., dated the 25th November 1891.

Extract from para. 3 of a letter, No. 294, dated the 25th January 1892, from Registrar, Chief Court, Punjab, to Chief Secretary to Government, Punjab

3. It would seem to be desirable that questions of pension and gratuity relating to officers of the process-serving establishments under the control of this Court should be uniformly

dealt with. At present such applications are generally submitted through this office, but in the two cases here mentioned and in one or two other instances this procedure does not seem to have been followed. I am accordingly to inquire what course should be followed in future in dealing with such cases.

* * * * *

Copy of a letter, No. 321, dated the 11th February 1892, from Officiating Chief Secretary to Government, Punjab, to Registrar, Chief Court, Punjab.

Financial.

I AM directed to acknowledge receipt of your letter No. 294 G., dated the 25th of January 1892, regarding the channel for submission of pension and gratuity applications of process-serving establishments.

2. In reply I am desired to forward copy of para. 2 of a letter. No. 1767 of the 9th July 1885, to the address of the Junior Secretary to the Financial Commissioners, Punjab, which left it to the Financial Commissioner to decide, in consultation with the Accountant-General, whether pension applications of Revenue Establishments should be submitted to the Accountant-General through the Financial Commissioner's office or through the offices of Commissioners of Divisions, and to request that the Judges may similarly decide whether in the case of Judicial Establishments, including process servers, the pension applications should be submitted through the Chief Court or the Divisional Courts.

Extract from para. 2 of a letter, No. 1767, dated 9th July 1885, from the Secretary to Government. Punjab, to the Junior Secretary to the Financial Commissioners, Punjab.

* * * * *

It will be necessary to decide, in consultation with the Accountant-General, whether the Commissioners of Divisions are to be held to be the Heads of the Revenue Department for the purpose of submitting pension applications to the Accountant-General, or if these applications should be submitted by the Financial Commissioner.

* * * * *

Copy of a letter, No. 727 G., dated the 17th February 1892, from Registrar, Chief Court, Punjab, to Accountant-General, Punjab.

I AM directed to forward a copy of a letter, No. 321, dated the 11th instant (Financial), from the Chief Secretary to Government, Punjab, regarding the channel for the submission of pension and gratuity applications of process-serving and other Judicial Establishments, and to ask which of the courses suggested in the letter you would consider most convenient. That is whether the Divisional Judges should be considered the heads of the Judicial Department for the purpose of submitting the above or the Chief Court as heretofore.

2. The ministerial establishments falling directly under the Judicial Department are—

1. Establishments of Divisional Courts.
2. Establishments of District Judges or (in districts where there is no separate officer as District Judge) of the Subordinate Judge with appellate powers.
3. Establishments of Provincial Small Cause Courts.
4. Establishments of ordinary Munsifs' Courts.
5. All process-serving establishments, including District Nazirs, Civil Nazars, Naib-Nazirs, Madad Naib-Nazirs, Madad Muharrirs, Execution Bailiffs and process-servers.

Other establishments (including those of mixed Civil, Criminal and Revenue Courts &c.) are under Commissioners and Financial Commissioners.

Copy of a letter, No. 22-953 P., dated the 4th March 1892, from Accountant-General, Punjab, to Registrar, Chief Court, Punjab.

In reply to your letter No. 727 G., dated the 17th February 1892, enquiring whether it would be more convenient that Divisional Judges should be considered the Heads of the Judicial Department for the purpose of submitting pension and gratuity applications, or the Chief Court as heretofore, I have the honor to state that as the present practice of submitting pension papers through the Chief Court entails extra delay in the disposal of the papers, it will be more convenient if such papers are submitted in future by Divisional Judge direct.

BOOK CIRCULAR No. II—1137 G. of 1892.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB AND OTHER PERSONS CONCERNED.

Dated 15th March 1892.

IN continuation of Book Circular No. VI—2915 G., dated the 23rd June 1890, the Judges are pleased to notify the following alterations in and additions to the rules regulating the qualifications, admission and certificates of proper persons to be Pleaders and Mukhtars of the courts of the Punjab published therewith.

SUBJECT.

Alterations in and additions to the rules regulating the qualifications, admission and certificates of proper persons to be Pleaders and Mukhtars in the Punjab.

2. The following is substituted for Rule II, clause (v), sub-clauses (a) and (b) of the said rules, namely:—

- (a) in the case of Bachelors of Law of the Punjab University, two years,
- (b) in the case of Bachelors of Law of other Universities, three years.

3. The following is substituted for Rule III, clause (i), of the said rules, namely:—

- (i) persons who shall have obtained the degrees of Bachelor of Arts and Bachelor of Law at one of the recognized Universities in British India :

Provided that, in the case of persons so qualified and holding degrees from any University other than the Punjab University, they shall not be admitted unless and until they shall have passed an examination in the following subjects and papers of the examinations mentioned below, namely :—

Of the First Certificate in Law Examination of the Punjab University.

Paper II.—Revenue Law and procedure applicable to the Punjab.

Paper V.—The Hindu and Muhammadan Laws and Customary Law of the Punjab.

Of the Licentiate in Law Examination of the Punjab University.

Paper I (a).—Civil Law,—Law of Property (including Land tenures and tenant right).

The 31st March 1892.

Addendum.

No. 1356 G.—After Rule XXIII of the rules contained in Book Circular No. XVIII—3822 G., dated the 5th September 1890, add the following rule:—

XXIII (A).—For the purposes of Rules XII, XVII, XVIII, XX and XXII the District Magistrate may authorize any local Magistrate to exercise any of the powers of the *Magistrate having the control over the lock-up*, in the case of a lock-up located at a distance from the head-quarters of a District or Subdivision.

CHIEF COURT.

No. 1340 G., dated the 30th March 1892.

Addenda et Corrigenda to Chief Court Circulars.

Substitute the annexed Statements A and B of offences *non-cognizable* and *cognizable by the Police*, respectively, for those appended to Book Circular No. XXII—5319 G., dated the 9th December 1890. The latter statements, together with Correction Slip No. 1848 G., dated the 10th April 1891, are hereby cancelled. (Circular Memo. No. 6—1332 G. of this day's date).

CXIX

STATEMENT A OF BOOK CIRC

Statement showing institution and disposal of cases non-cognizable by the

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1	115	Abetment of offence not committed, &c.
	117	Abetting commission of offence by public, &c.
	118, 119	Concealing design to commit offence
		Total
		CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILLITY, &c., &c.
2	121 to 130, 505	Offences against the State
3	137	Harbouring deserters by Master of Ship
4	172 to 190, 201 to 204, 213 to 215, 227, 228,	Offences against public justice
5	161 to 163, 217 to 223	Offences by public servants
6	193 to 200, 205 to 211, 421 to 424	False evidence, false complaints and claims, and fraudulent deeds and disposition of property.
7	465 to 477	Forgery or using fraudulently forged documents
8	284 to 287	Offences relating to weights and measures
9	482 to 489	Making or using false trade-marks
10	140, 154 to 156, 180	Rioting, unlawful assembly, affray
		Total
		CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
11	312 to 316	Causing miscarriage
12	370	Buying or disposing of slaves
		Total
		CLASS III.—SERIOUS OFFENCES AGAINST PROPERTY.
13	384 to 380	Extortion
		CLASS IV.—MINOR OFFENCES AGAINST THE PERSON.
14	345	Wrongful confinement
15	352, 355, 358	Criminal force
16	334	Hurt on grave or sudden provocation
17	323	Voluntarily causing hurt
		Total
		CLASS V.—MINOR OFFENCES AGAINST PROPERTY.
18	417 to 420	Cheating
19	403 and 404	Criminal misappropriation of property
20	409	Criminal breach of trust by public servants, bankers, &c.
21	426, 427, 434	Mischief (simple)
		Total
		CLASS VI.—OTHER OFFENCES NOT SPECIFIED ABOVE.
22	298	Offences against religion
23	490 to 402	Criminal breach of contract of service
24	493 to 498	Offences relating to marriage
25	500 to 502	Defamation
26	504, 506 to 510	Intimidation and insult
27	271 to 276, 278, 284, 287, 288 290.	Public and local nuisances
28	291 A	Keeping a lottery office
29	Offences under Chapter VIII (a), C. P. C.	Security for keeping the peace on conviction
30	Offences under Chapter X, C. P. C.	Public nuisances
31	Cases under Chapter XII, C. P. C.	Disputes as to immoveable property
32	Cases under Chapter XXXVI, C. P. C.	Maintenance of wives and children
33	Special laws, offences under which are not cognizable by the Police ... ..	... ..
		Total
		GRAND TOTAL

VI.

LAB No. XXII OF 1890.

Police in the

District for the quarter ending

189

4	5	6	7	8	9	10	11
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INSTITUTIONS.

[illegible]

CXXX

STATEMENT A OF BOOK CIRC

Statement showing institution and disposal of cases non-cognizable by the

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1	115 117 118, 119	Abetment of offence not committed, &c. Abetting commission of offence by public, &c., Concealing design to commit offence Total
2	121 to 130, 505,	CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILLITY, &c., &c.
3	137	Offences against the State
4	172 to 190, 201 to 204, 213 to 215, 227, 228	Harbouring deserters by Master of Ship
5	181 to 109, 217 to 223	Offences against public justice
6	193 to 200, 205 to 211, 421 to 424,	Offences by public servants
7	465 to 477	False evidence, false complaints and claims, and fraudulent deeds and disposition of property.
8	264 to 267	Forgery or fraudulently using forged documents
9	482 to 489	Offences relating to weights and measures
10	149, 154 to 156, 160	Making or using false trade-marks Rioting, unlawful assembly, affray Total
11	312 to 316	CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
12	370	Causing miscarriage Buying or disposing of slaves Total
13	384 to 389	CLASS III.—SERIOUS OFFENCES AGAINST PROPERTY.
14	345	Extortion
15	352, 355, 358	CLASS IV.—MINOR OFFENCES AGAINST THE PERSON.
16	384	Wrongful confinement
17	323	Criminal force
18	417 to 420	Hurt on grave or sudden provocation
19	403 and 404	Voluntarily causing hurt
20	409	Total
21	406, 427, 434	CLASS V.—MINOR OFFENCES AGAINST PROPERTY.
22	238	Cheating
23	490 to 492	Criminal misappropriation of property
24	493 to 498	Criminal breach of trust by public servants, bankers, &c.
25	500 to 502	Mischief (simple)
26	504, 506 to 510	Total
27	271 to 276, 278, 284, 287, 288, 290,	CLASS VI.—OTHER OFFENCES NOT SPECIFIED ABOVE.
28	291 A	Offences against religion
29	Offences under Chapter VIII(a), C. P. C.	Criminal breach of contract of service
30	Offences under Chapter X, C. P. C.	Offences relating to marriage
31	Cases under Chapter XII, C. P. C.	Defamation
32	Cases under Chapter XXXVI, C. P. C.	Intimidation and insult
33	Special laws, offences under which are not cognizable by the Police	Public and local nuisances Keeping a lottery office Security for keeping the peace on conviction Public nuisances Disputes as to immoveable property Maintenance of wives and children Total GRAND TOTAL

VI.

LAB No XXII of 1890—continued.

Police in the

District for the quarter ending

189 .

[illegible]

CXXI

STATEMENT A OF BOOK CXXI

Statement showing institution and disposal of cases non-cognizable by the

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1	115 117 118, 119	Abetment of offence not committed, &c. Abetting commission of offence by public, &c. Concealing design to commit offence Total
2	121 to 130, 503	CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILLITY, &c., &c.
3	137	Offences against the State
4	172 to 190, 201 to 204, 213 to 215, 227, 228,	Harbouring deserters by Master of Ship
5	181 to 189, 217 to 223	Offences against public justice
6	193 to 200, 205 to 211, 421 to 424,	Offences by public servants
7	465 to 477	False evidence, false complaints and claims and fraudulent deeds and disposition of property.
8	284 to 287	Forgery or fraudulently using forged documents
9	482 to 489	Offences relating to weights and measures
10	149, 154 to 156, 100	Making or using false trade-marks
		Rioting, unlawful assembly, affray Total
11	312 to 316	CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
12	370	Causing miscarriage
		Buying or disposing of slaves Total
13	384 to 389	CLASS III.—SERIOUS OFFENCES AGAINST PROPERTY.
		Extortion
14	345	CLASS IV.—MINOR OFFENCES AGAINST THE PERSON.
15	352, 355, 358	Wrongful confinement
16	334	Criminal force
17	323	Offences relating to weights and measures
		Hurt on grave or sudden provocation
		Voluntarily causing hurt Total
18	417 to 420	CLASS V.—MINOR OFFENCES AGAINST PROPERTY.
19	403 and 404	Cheating
20	409	Criminal misappropriation of property
21	426, 427, 434... ..	Criminal breach of trust by public servants, banker, &c.
		Mischief (simple)... .. Total
22	298	CLASS VI.—OTHER OFFENCES NOT SPECIFIED ABOVE.
23	490 to 492	Offences against religion
24	493 to 498	Criminal breach of contract of service
25	500 to 502	Offences relating to marriage
26	504, 506 to 510	Defamation
27	271 to 276, 278, 284, 287, 288, 290,	Intimidation and insult
28	291 A	Public and local nuisances
29	Offences under Chapter VIII (a), C. P. C.	Keeping a lottery office
30	Offences under Chapter X, C. P. C.	Security for keeping the peace on conviction
31	Cases under Chapter XII, C. P. C.	Public nuisances
32	Cases under Chapter XXXVI, C. P. C.	Disputes as to immoveable property
	Special laws, offences under which are not cognizable by the Police	Maintenance of wives and children Total
		GRAND TOTAL

CXXX

STATEMENT A OF BOOK CIRC

Statement showing institution and disposal of cases non-cognisable by the

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1	115	Abtment of offence not committed, &c.
	117	Abetting commission of offence by public, &c.
	118, 119	Concealing design to commit offence
		Total
2	121 to 130, 506	CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILITY, &c., &c.
3	137	Offences against the State
4	172 to 190, 201 to 204, 213 to 215, 227, 228,	Harbouring deserters by Master of Ship
	181 to 169, 217 to 223	Offences against public justice
6	193 to 200, 205 to 211, 421 to 424,	Offences by public servants
7	465 to 477	False evidence, false complaints and claims, and fraudulent deeds and disposition of property.
8	284 to 287	Forgery or fraudulently using forged documents
9	482 to 489	Offences relating to weights and measures
10	148, 154 to 158, 160... ..	Making or using false trade-marks
		Rioting, unlawful assembly, affray
		Total
11	312 to 316	CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
12	370	Causing miscarriage
		Buying or disposing of slaves
		Total
13	384 to 389	CLASS III.—SERIOUS OFFENCES AGAINST PROPERTY.
14	345	Extortion
		CLASS IV.—MINOR OFFENCES AGAINST THE PERSON.
15	352, 355, 358	Wrongful confinement
16	334	Criminal force
17	323	Hurt on grave or sudden provocation
		Voluntarily causing hurt
		Total
18	417 to 420	CLASS V.—MINOR OFFENCES AGAINST PROPERTY.
19	403 and 404	Cheating
20	400	Criminal misappropriation of property
21	426, 427, 434	Criminal breach of trust by public servants, bankers, &c.
		Mischief (Simple)
		Total
22	298	CLASS VI.—OTHER OFFENCES NOT SPECIFIED ABOVE.
23	490 to 492	Offences against religion
24	493 to 498	Criminal breach of contract of service
25	500 to 502	Offences relating to marriage
26	504, 506 to 510	Defamation
27	271 to 276, 278, 284, 267, 288, 290,	Intimidation and insult
28	201 A	Public and local nuisances
29	Offences under Chapter VIII (a) C. P. C.	Keeping a lottery office
30	Offences under Chapter X, C. P. C.	Security for keeping the peace on conviction
31	Cases under Chapter XII, C. P. C.	Public nuisances
32	Cases under Chapter XXXVI, C. P. C.	Disputes as to immoveable property
	Special laws, offences under which are not cognizable by the Police	Maintenance of wives and children
		Total
		GRAND TOTAL

Police in the

District

for the quarter ending 189 .

27	28	29	30	31
Pending.		Total, including cases disposed of and pending. (The total of columns 14 to 28 should agree with columns 12 and 13.)		REMARKS.
Cases.	Persons.	Cases.	Persons.	

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CXXX

STATEMENT B OF BOOK

Statement showing institution and disposal of cases cognizable by the Police, instituted upon

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1	{ 115 ... 117 ... 118, 119 ...	Abetment of offence not committed, &c. ... Abetting commission of offence by public, &c. ... Concealing design to commit offence, &c. ...
		Total ...
		CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILITY, SAFETY AND JUSTICE.
2	131 to 136, 138 ...	Offences relating to Army and Navy ...
3	231 to 233, 467 and 471 ...	Do. do. to coin, stamps and Government notes. ...
4	212 to 216 ...	Harbouring an offender ...
5	224 to 228 ...	Other offences against public justice ...
6	143 to 153, 157, 158 ...	Rioting or unlawful assembly ...
7	140, 170, 171 ...	Personating public servant or soldier ...
		Total ...
		CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
8		
9		
10	{ 302, 303, 306 ...	{ Murder { by thugs ...
11		{ " dakaita... ..
12		{ " robbers ...
13		{ " poison ...
14	307 ...	Other murders ...
15	304, 308 ...	Attempt at murder ...
16	376 ...	Culpable homicide ...
17	377 ...	Rape ...
18	317, 318 ...	Unnatural offences ...
19	306, 308, 309 ...	Exposure of infants, or concealment of birth ...
20	329, 331, 333 ...	Attempt at, and abetment of, suicide ...
21		Grievous hurt for the purpose of extorting property or confession or deter-
22	325, 326 325 ..	ring public servant ...
23	327, 330, 332 ...	Grievous hurt ...
24		Administering stupefying drugs to cause hurt ...
25	324 ...	Hurt for purpose of extorting property or confession or deterring public
26	363 to 360 ...	servant. ...
	346 to 348 ...	Hurt by dangerous weapon ...
		Kidnapping or abduction ...
		Wrongful confinement and restraint in secret or for purpose of extortion
		Carried over ...

VII.

CIRCULAR No. XXII OF 1890.

direct complaint to a Magistrate or on a Magistrate's own motion, for the quarter ending 189 .

4	5	6	7	8	9	10	11	12	13	14	15
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INSTITUTIONS

CASES AND PERSONS.

Instituted upon direct complaint to a Magistrate, or on a Magistrate's own motion.

[illegible]

CXXI

STATEMENT B OF BOOK

Statement showing institution and disposal of cases cognizable by the Police, instituted upon

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME
1	115 ... 117 ... 118, 119 ...	Abetment of offence not committed, &c. ... Abetting commission of offence by public, &c. ... Concealing design to commit offence, &c. ...
		Total ...
		CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILITY, SAFETY AND JUSTICE.
2	131 to 136, 138 ...	Offences relating to Army and Navy ...
3	231 to 263, 467 and 471 ...	Do. do. to coin, stamps and Government notes. ...
4	212 to 216 ...	Harbouring an offender ...
5	224 to 226 ...	Other offences against public justice ...
6	143 to 153, 157, 158 ...	Rioting or unlawful assembly ...
7	140, 170, 171 ...	Personating public servant or soldier ...
		Total ...
		CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
8		Murder { by thags ... ,, dakaits ... ,, robbers ... ,, poison ... Other murders ...
9		
10	302, 303, 306 ...	
11		
12		
13	307 ...	Attempt at murder ...
14	304, 308 ...	Culpable homicide ...
15	376 ...	Rape ...
16	377 ...	Unnatural offences ...
17	317, 318 ...	Exposure of infants, or concealment of birth... ..
18	306, 306, 309 ...	Attempt at, and abetment of, suicide ...
19	323, 331, 333 ...	Grievous hurt for the purpose of extorting property or confession or deterring public servant ...
20	325, 326, 335 ...	Grievous hurt ...
21	338 ...	Administering stupefying drugs to cause hurt ...
22	327, 330, 332 ...	Hurt for purpose of extorting property or confession or deterring public servant. ...
23	324 ...	Hurt by dangerous weapon ...
24	363 to 369 ...	Kidnapping or abduction ...
25	336 to 348 ...	Wrongful confinement and restraint in secret or for purpose of extortion. ...
		Carried over ...

CXIX

STATEMENT B OF BOOK

Statement showing institution and disposal of cases cognizable by the Police, instituted upon

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
1 {	115	Abetment of offence not committed, &c.
	117	Abetting commission of offence by public, &c.
	118, 119	Concealing design to commit offence &c.
		Total
		CLASS I.—OFFENCES AGAINST THE STATE, PUBLIC TRANQUILITY, SAFETY AND JUSTICE.
2	131 to 136, 138	Offences relating to army and Navy
3	231 to 263, 467 and 471	Do. do. to coin, stamps and Government notes
4	212 to 218	Harbouring an offender
5	224 to 228	Other offences against public justice
6	143 to 153, 157, 158	Rioting or unlawful assembly
7	140, 170, 171	Personating public servant or soldier
		Total
		CLASS II.—SERIOUS OFFENCES AGAINST THE PERSON.
8		
9		
10	302' 303, 306'	Murder { by thugs
11		" daktas
12		" robbers
		" poison
		Other murders
13	307	Attempt at murder
14	304 308	Culpable homicide... ..
15	376	Rape
16	377	Unnatural offences
17	317, 318	Exposure of infants, or concealment of birth
18	305, 306, 309	Attempt at, and abetment of, suicide
19	329, 331, 333	Grievous hurt for the purpose of extorting property or confession & deterring public servant
20	325, 326, 335	Grievous hurt
21	328	Administering stupefying drugs to cause hurt
22	327, 330, 332	Hurt for purpose of extorting property or confession [or deterring public servant.
23	324	Hurt by dangerous weapon
24	363 to 369	Kidnapping or abduction
25	346 to 348	Wrongful confinement and restraint [in secret or] for purpose of extortion.

VII.

CIRCULAR No. XXII OF 1890—continued.

direct complaint to a Magistrate or on a Magistrate's own motion, for the quarter ending 189 .

25	26	27	28	29	30	31	32	33	34
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DISPOSALS—concluded.

CASES AND PERSONS.

[illegible]

CXXX

STATEMENT B OF BOOK CIRCULAR

Statement showing institution and disposal of cases cognizable by the Police, instituted upon

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
CLASS IV.—MINOR OFFENCES AGAINST THE PERSON.		
44	341 to 344	Wrongful restraint and confinement... ..
45	336, 337	Rash act causing hurt or endangering life
46	374	Compulsory labour
		Total
CLASS V.—MINOR OFFENCES AGAINST PROPERTY.		
47	453 to 456	Lurking house-trespass or house-breaking
48	379 to 382	Theft { of cattle
49		{ ordinary
50	406 to 408	Criminal breach of trust... ..
51	411, 414	Receiving stolen property
52	447, 448	Criminal or house trespass
53	461, 462	Breaking closed receptacle
		Total
TOTAL OF PRECEDING CLASSIFICATIONS I TO V		
CLASS VI.—OTHER OFFENCES NOT SPECIFIED ABOVE.		
54	295 to 297	Offences against religion... ..
55	Chapter VIII (b), Criminal Procedure Code, and Act IX of 1874	Vagrancy and bad character
56	Cognizable offences under the Act specified	Offences against Gambling Act
57		Ditto Excise Laws
58		Ditto Opium Act
59		Ditto Railway Laws
60		Ditto Salt and Custom Laws
61		Ditto Arms Act
		Carried over

CXXI

STATEMENT B OF BOOK CIRCULAR

Statement showing institution and disposal of cases cognizable by the Police, instituted upon

1	2	3
trial No.	Law under which punishable.	DESCRIPTION OF CRIME.
		Brought forward ...
		CLASS VI—continued.
62	269, 277, 279, 280, 283, 285, 286, 289, 291 to 294, section 34 of Act V of 1861, and any other Municipal or Local Laws.	Public and local nuisances ...
63	Act III of 1880, sections 14, 15 and 27.	Cantonment Act ...
64	Act VII of 1871, sections 71 and 76.	Indian Emigration ...
65	Act X of 1886, section 651	Escape from custody under Civil Procedure Code or warrant ...
66	Act IX of 1874, sections 4, 5, 19, 20 and 23.	European Vagrancy ...
67	Act XVII of 1878, sections 25 and 28.	Northern India Ferry Act...
68	Act VII of 1878, sections 25, 32, 42, 51, 61, 62 and 76.	Forest Laws ...
69	Act XV of 1872, sections 68 to 71, 73 to 75.	Indian Christian Marriage Act ...
70	Act V of 1871, section 20.	Prisoners' Act ...
71	Act XIV of 1866, section 48.	Post Office Act ...
72	Act III of 1877, sections 81 and 82.	Registration Act ...
73	Act XXVII of 1871, sections 19 and 20.	Criminal Tribes ...
74	Act XXXI of 1871, section 18.	Indian weights and measures of capacity ...
75	Act IV of 1874, section 6	Foreign recruiting...
76	Act IV of 1872, section 47	Punjab Laws Act ...
77	Act I of 1876, section 15	Telegraph Act ...
78	44 and 45 Vic., Caps. 58 and 156.	Persons found purchasing soldiers' regimental necessaries, equipment stores, &c. ...
		Total ...
		GRAND TOTAL ...

VII.

No. XXII of 1890—continued.

direct complaint to a Magistrate or on a Magistrate's own motion, for the quarter ending 189

[illegible]

CXXX

STATEMENT B OF BOOK CIRCULAR

Statement showing institution and disposal of cases cognisable by the Police, instituted upon

1	2	3
Serial No.	Law under which punishable.	DESCRIPTION OF CRIME.
		Brought forward
		CLASS VI—concluded.
62	269, 277, 279, 280, 283, 285, 286, 289, 291 to 294, section 34 of Act V of 1861, and any other Municipal or Local Laws.	Public and local nuisances
63	Act III of 1880, sections 14, 15 and 27.	Cantonment Act
64	Act VII of 1871, sections 71 and 76.	Indian Emigration
65	Act X of 1886, section 651	Escape from custody under Civil Procedure Code or warrant
66	Act IX of 1874, section 4, 5, 19, 20 and 23.	European Vagrancy
67	Act XVII of 1878, sections 25, and 28.	Northern India Ferry Act
68	Act VII of 1878, sections 25, 32, 42, 51, 61, 62 and 76.	Forest Laws
69	Act XV of 1872, sections 68 to 71, 73 to 75.	Indian Christian Marriage Act
70	Act V of 1871, section 29	Prisoners' Act
71	Act XIV of 1866, section 48.	Post Office Act
72	Act III of 1877, sections 81 and 82.	Registration Act
73	Act XXVII of 1871, sections 19 and 20.	Criminal Tribes
74	Act XXXI of 1871, section 16.	Indian weights and measures of capacity
75	Act IV of 1874, section 6	Foreign recruiting
76	Act IV of 1872, section 47	Punjab Laws Act
77	Act I of 1876, section 15	Telegraph Act
78	44 and 45 Vic., Caps. 58 and 156.	Persons found purchasing soldiers' regimental necessaries, equipment, stores, &c.
		Total
		GRAND TOTAL

VII.

No XXII OF 1890—continued.

direct complaint to a Magistrate or on a Magistrate's own motion for the quarter ending 189

[illegible]

CIRCULAR MEMO. No. 6—1339 G. of 1892.

ALL DISTRICT MAGISTRATES IN THE PUNJAB.

*Dated 30th March 1892.*STATEMENTS A and B of offences *non-cognizable* and *cognizable* by the Police, respectively, circulated with Book Circular No. XXII—5319 G., dated the 9th December 1890, having been

SUBJECT.

Amendment of Statements A and B attached to Book Circular No. XXII—5319 G., dated the 9th December 1890.

found inadequate for the compilation of correct statistics in the Police Department, the annexed revised Statements A and B (Criminal Forms Nos. CXXXVI and CXXXVII) are, with the concurrence of the Inspector-General of Police, Punjab, hereby issued for future use, and should be substituted for the forms previously supplied, which are hereby cancelled.

2. The forms can be obtained from the Superintendent, Government Press, on the usual indent. Twelve spare copies of Statements A and B are herewith forwarded for immediate use. The Vernacular copies will be sent in due course.

CIRCULAR MEMO. No. 7—1410 G. of 1892.

To

ALL DIVISIONAL JUDGES, DEPUTY COMMISSIONERS AND DISTRICT JUDGES.
IN THE PUNJAB.*Dated 5th April 1892.*

THE annexed correspondence, regarding the question of the inclusion in

SUBJECT.

Inclusion in emoluments reckoning for pension of the amount drawn by District Nazirs as members of the process-serving establishment.

emoluments reckoning for pension of the amount drawn by District Nazirs as members of the process-serving establishment. is circulated for information.

Copy of a letter No. 19444 P., dated the 17th January 1892, from the Accountant-General, Punjab, to the Chief Secretary to the Government of the Punjab.

WITH reference to paragraph 3 of your letter No. 24, dated the 11th January 1892 I have the honor to state that as Raja Ram, Ghulam Mohi-ud-din and Prem Nath retired before the introduction of the Judicial scheme, there was no doubt as to the correctness of taking the sum of Rs. 25, representing income derived from fees, into account in the calculation of average emoluments, and that the reports in the cases of Muhammad Gohar and Kirpa Ram were made subject to the orders of Government in Ghulam Jilani's case.

2. With regard to those orders, I would remark that since the introduction of the Judicial scheme, the amount of Rs. 25 has been sanctioned to be the pay of an appointment of a Sheriff in the District Judge's Court and it is drawn in the establishment bills of that Court. It follows, therefore, that under present arrangements an officer who is Sheriff of both the Deputy Commissioner's Court and the District Judge's Court holds two distinct appointments, and under Article 182 of the Civil Service Regulations, it seems necessary that Government should specially sanction two appointments being held by one and the same person to give him a right to count for pension in both. It was for this reason that the allowance of Rs. 25 was not taken into account in Ghulam Jilani's case, as the sanction of Government had not been accorded to his holding the two appointments, and I would enquire whether, with reference to the orders now issued, it is to be understood that Government sanction these two appointments being held by one and the same person in future.

Copy of a letter No. 393, dated the 18th of February 1892, from the Officiating Chief Secretary to Government, Punjab, to the Accountant-General, Punjab.

I AM directed to acknowledge the receipt of your letter No. 19444 P., dated the 17th January 1892, regarding the question of the inclusion in emoluments, reckoning for pension, of the amount drawn by District Sheriffs as Nazirs on the process-serving establishment.

2. In regard to the several cases cited by this office as precedents in support of a view that the amount should be included, you state that as Raja Ram, Ghulam Mohi-ud-din and Prem Nath retired before the introduction of the Judicial scheme the pay drawn as Nazir on the

process-serving establishment was properly included in those instances, and that in the cases of Muhammad Gohar and Kirpa Ram who retired after the introduction of that scheme, your reports were made subject to the orders of Government in Ghulam Jilani's case. As the retirement of Muhammad Gohar * and Kirpa Ram † took place several years before that of Ghulam Jilani, I am to enquire what is meant by this statement which would seem to be *prima facie* incorrect, though the reports on the cases of the two persons in question are not in this office to refer to.

3. Again the statement in paragraph 2 of your letter, that since the introduction of the Judicial scheme the amount drawn by the District Sheriff as Nazir on the process-serving establishment has been sanctioned as the pay of a Sheriff in the District Judge's Court, also appears to be incorrect as will be seen from the Chief Court's Circular Memo. No. 11—778, dated the 26th February 1885, and Chief Court Book Circular No. XV—2220, dated the 4th July 1885. It was only in 1890 that a separate *Civil Nazir* subordinate to the District Judge was appointed, vide paras. 10 and 11 of Chief Court Book Circular No. XXI—4513 G., dated 10th November 1890. In these circumstances specific orders authorizing the District Sheriff to hold the additional appointment of Nazir on the process-serving establishment do not appear necessary.

Copy of a letter No. 23178 P., dated the 10th March 1892, from the Accountant-General Punjab, to the Chief Secretary to Government, Punjab, Lahore.

IN reply to your letter No. 393, dated the 18th ultimo, I have the honor to explain that what was intended in the first paragraph of my letter No. 19444, dated 17th January 1892, was that the reports submitted in the cases of Muhammad Gohar and Kirpa Ram were subject to revision, that it would be resubmitted to Government for revision, if the report of this office in Ghulam Jilani's case was accepted. I regret that through inadvertence a somewhat different meaning was conveyed by my letter.

2. In regard to the question at issue, namely, whether the Rs. 25 extra drawn by the District Sheriff as Nazir on the process-serving establishments subsequent to the introduction of the Judicial scheme, should be regarded as the pay of a separate appointment or merely an allowance, I have the honor to state that the former view was taken by this office on several grounds (1) because in Schedule C attached to Chief Court Circular Memo. No. 11—778, dated 26th February 1885, one Nazir on Rs. 25 seems to have been provided for each district; (2) because the circulars themselves do not expressly term the sum an "allowance"; (3) because the sum has always been drawn in a separate bill from the District Sheriff's own pay and when there has been a distinct officer as District Judge in the district, the bill has in many cases, been signed by him and not by the Deputy Commissioner. I have at the same time no objection to treat the sum as an "allowance" to be drawn as a matter of course by the District Sheriff for the time being, in addition to his own pay, and this view will accordingly under the authority of your letter under acknowledgment, be taken in future.

CIRCULAR MEMO. No. 8—1493 G. of 1892.

To

ALL DIVISIONAL JUDGES AND JUDGES OF COURTS OF SMALL CAUSES
IN THE PUNJAB.

Dated 12th April 1892.

IN continuation of the Court's Book Circular No. II—1011 G., dated the 26th February 1891, issuing instructions in regard to the management of the income and expenditure of the Record Office Funds relating to Divisional and Small Cause Courts, the Judges are pleased, with the sanction of the Local Government, to add the following clause to paragraph 4 of the Circular quoted above :—

SUBJECT.
—
Additions to Book Circular No. II—1011 G., dated the 26th February 1891, in regard to the management of the income and expenditure of the Record Office Funds of Divisional and Small Cause Courts.

"(4) providing for the care of Court libraries."
It is to be clearly understood, however, that it is not intended that books or furniture should be purchased from the fund for the purposes of the Library, these heads being provided for in the ordinary budget provision for each Court; but the Clerk of Court or some proper official can be granted a small allowance from the fund, as was done formerly under the authority of this Court's General Letter No. 1228, dated the 12th March 1889, where found necessary, and subject to approval by this Court in each case,

2. With regard to the second head of expenditure, contained in paragraph 4 of the Book Circular above quoted, the Government has ruled that expenditure on account of *keeping the Court grounds in proper order* may be considered as falling under that head. Such expenditure should, however, be limited to meeting the cost of the necessary garden establishment in excess of what can be met from sale of produce and other available sources.

BOOK CIRCULAR No. I-423 G. of 1892.

To

ALL CIVIL COURTS EXERCISING INSOLVENCY JURISDICTION IN THE PUNJAB.

Dated 12th April 1892.

THE rules for the administration of Insolvent Estates contained in Judicial Circular CXXXIV of the volume of Judicial Circulars, third edition, are limited to proceedings taken under the insolvency provisions of Act IV of 1872.

Instructions regulating insolvency proceedings under chapter XX of the Civil Procedure Code.

The forms, accounts and returns contained in Appendix V of the volume of Judicial Circulars are also applicable only to proceedings under the special Act referred to. Insolvency jurisdiction under Act IV of 1872 is at the present time only exercised by the Judges of the Courts of Small Causes at Lahore, Amritsar and Delhi, and there appears to be no practical necessity for these courts to continue to exercise their powers under that Act, as the provisions of chapter XX of the Code of Civil Procedure, have been found to be sufficient to meet the requirements of all other parts of the province, and no special reasons exist for applying a different law to the three towns in question.

2. It is no doubt true that the insolvency provisions of the law of 1872 possess advantages in some respects over those of the Code, and that the latter are defective in several particulars; at the same time there are serious objections to the existence of two systems of insolvency procedure in the same province and in the same courts. The insolvency procedure of the Code is in force throughout India, while the operation of the insolvency provisions of Act IV of 1872 is limited, as already stated, to three towns in this province. Under these circumstances, and pending the further legislation which is at present under the consideration of the Government of India, it is desirable that no application made under the provision of Act IV of 1872 should be granted by the Small Cause Courts at Lahore, Amritsar and Delhi which can, upon the facts disclosed, be brought under the insolvency procedure contained in chapter XX of the Code of Civil Procedure.* The cases in which action can be taken under Act IV of 1872, but not under the Code, should be extremely rare.

3. No rules have hitherto been issued regarding the action to be taken under the insolvency provisions of the Code of Civil Procedure,† but the Judges now find it necessary to issue instructions on certain points connected with proceedings falling under this law, and to prescribe forms, accounts and registers for the conduct of insolvency business.

4. The annexed rules are accordingly issued, under the provisions of Rules issued under section 652 of the Code, for the guidance of courts exercising jurisdiction under chapter XX thereof.

* The three courts have been invested with jurisdiction under the Act of 1872, which contains no power to revoke the jurisdiction so invested.

† See Judicial Circular No. XXVII, pages 107 to 109 of the volume.

5. Draft copies of the rules were, on two occasions, circulated to courts concerned were concerned in administering the provisions of chapter XX of the Code for opinion. The replies received have been carefully considered by the Judges, and several important alterations have been made in accordance with the recommendations of officers consulted. No practical difficulty should, therefore, be felt in carrying out the rules here issued.

6. The opinions expressed by some of the officers consulted show that some Object and scope of the misapprehension exists as to the object and scope of rules. It should be understood that they are not intended to explain or add to the law relating to insolvent judgment-debtors contained in chapter XX of the Code, and that questions of insolvency law which appear doubtful cannot be cleared up by rules framed by the Chief Court. The object in view is merely to provide subsidiary rules of procedure and forms for the conduct of insolvency proceedings falling under the Code.

7. The course of procedure prescribed in chapter XX of the Code should be strictly observed in dealing with applications for declaration of insolvency, special attention being given to the provisions regarding the hearing of the application, the discharge of the insolvent, and the treatment of his property.

Remarks on certain features of the procedure to be followed in dealing with applications for declaration of insolvency.

8. In this connection it may be useful to offer some remarks on certain features of the procedure to be followed in dealing with applications for declaration of insolvency:—

- (a) The application may be made by either a judgment-debtor or a decree-holder.
- (b) When the application is by a judgment-debtor, he must either have been—
 - (1) arrested or imprisoned in execution of a decree for money; or
 - (2) an attachment order must have been made against his property in execution of such a decree.
- (c) The application must contain the particulars set out in section 345.
- (d) The application, if made by the judgment-debtor, should contain full particulars of the assets and liabilities of the applicant. If made by a creditor, this information must be elicited at the hearing (section 350) by an examination of the judgment-debtor and such creditors as may be present, and by taking such other evidence as may be necessary.

If it is necessary to protect the property of the judgment-debtor in the interests of the creditors, pending the passing of an order under section 51, the court can take such measures as may be necessary under section 503 of the Code—(see section 647 also.) It is desirable to bring on to the proceedings all the creditors of the insolvent, and as to creditors mentioned in the application or applying under section 348 no difficulty arises. Creditors not mentioned in the application cannot be dealt with unless they apply under section 348 or section 353, and it is important that this should be clearly understood so that a creditor not before the court acting under chapter XX, may not proceed to attach the insolvent's property by independent proceedings in execution of decree before such property has been taken over by the

court under section 503 or the provisions of chapter XX, and thus deprive the creditors registering under the insolvency law of the whole or a portion of the assets.

As only creditors actually holding decrees could take independent action, there should be no difficulty in ascertaining the names of all such creditors and causing their names to be entered in the application. If this is done early action under section 503 of the Code would effectually prevent any creditors from holding aloof from the insolvency proceedings.

Property attached in execution of decree prior to insolvency proceedings by creditors named in the application made under section 344 would, of course, be further dealt with by the court acting under chapter XX.

- (e.) A court acting under chapter XX must be regarded as a court executing decrees in the special manner provided in that chapter, as the declaration made under section 351 constitutes a decree in favor of each creditor entered in the schedule framed under section 352 in respect of the amount therein registered in his name and the decree passed in favor of any scheduled creditor by the ordinary civil court becomes merged in that recorded under sections 351 and 352. The former cannot therefore be further executed, and the latter can only be executed by a court acting under chapter XX.
- (f.) It should be observed that where the insolvent has property which has to be converted into money, a receiver must be appointed under section 351, and the judgment-debtor can only be discharged when the receiver certifies, in the manner required by section 355, that he has taken over the insolvent's property or that the insolvent has done all in his power to that end.
- (g.) The court acting under chapter XX must follow the ordinary provisions of the Code relating to the execution of decrees so far as they may apply, in regard to matters not specially provided for by chapter XX. itself. The provisions of sections 647-650 (both inclusive) should be borne in mind in this connection.
- (h.) Every order under section 351 must be published in the *Punjab Gazette*. The court has reason to believe that the provisions of section 354 of the Code are not always observed in this respect.
- (i.) The order under section 351, appointing a receiver, vests the whole of the insolvent's property (whether set forth in the application or not), except such as falls under section 266 of the Code, in such receiver; and the latter has, therefore, all the powers of the insolvent himself in regard to disposing of it. Those powers must, however, be exercised under the control of the court appointing such receiver, and such court is itself bound, in its action by the law relating to execution of decrees and that contained in chapter XX. It follows, therefore, that in converting the insolvent's property into money, the receiver and the court acting under chapter XX must be guided by the provisions of chapter XIX of the Code. Under those provisions and the rules issued by the Local Government in Notification No. 1297 S. of the 10th September 1885, made under section 327 of the Code, land applied to agriculture or pastoral purposes cannot be sold without the sanction of the Commissioner or Financial Commissioner, as the case may be, or otherwise than through the Deputy Commissioner

(Collector). The provisions of section 326 of the Code must also be held applicable to proceedings under chapter XX relating to such land.

(j.) The imprisonment to which a judgment-debtor applying under chapter XX may be sentenced at the instance of a creditor, under section 359, is not mere imprisonment in the civil jail such as is provided for in chapter XIX-I of the Code. In the case of section 359, the imprisonment awarded is a definite sentence passed upon the insolvent's conviction of an act of bad faith falling under that section, and the nature of the imprisonment is governed by section 2, clause (18), of the General Clauses Act, I of 1868, and may be of either of the descriptions defined in the Indian Penal Code. The prisoner being sent to the ordinary jail and not to the civil jail; no subsistence money, under section 339 of the Code, need be deposited.

(k.) If in any case, it becomes necessary to authorize the receiver to conduct litigation connected with the recovery or conversion of the insolvent's property, the cost of such litigation is a proper charge against the estate and should be recovered therefrom before any distribution of assets is made. If the assets of the estate are not in a position to bear the charge, it is for the creditors to decide whether they will provide the receiver with the money necessary and take their chance of recovering it, if successful, as a first charge upon the estate, or forego the litigation.

9. Suggestions have been received from several quarters to the effect that court officials should, when appointed receivers, be remunerated by commission in the same way as non-official receivers are remunerated under section 356. Officials acting as receivers are not to be remunerated by commission. The Judges, however, consider that where the law allows remuneration of this character and the work is done by a paid official, such remuneration should not go to the official, who is paid by Government for his services: the rules accordingly provide that in such cases the commission shall be paid into the Insolvency Fund.* It is probable that paid officials of the court will only be appointed receivers in cases in which the assets are small and the duties devolving on the receiver are not arduous. In all important cases it will certainly be found necessary to employ special non-official receivers who have sufficient time at their disposal to perform the work involved efficiently. In ordinary cases there appears to the Judges to be no reason why the Nazir or other proper officer of the court should not deal with the property of the insolvent just as he does with that of any ordinary judgment-debtor, and without any additional remuneration.

10. In conducting proceedings under chapter XX, the following observations and instructions should be borne in mind:—
Observations and instructions in connection with the conduct of proceedings under chapter XX.

(a.) Every application made under section 344 of the Code of Civil Procedure, whether by a judgment-debtor or a decree-holder, should as soon as may be after it is filed, be carefully examined to see whether it fulfils the requirements of section 345, and has been duly signed and verified as required by section 346 of the Code. The court, if satisfied that the application is in proper form, should fix a day for the hearing of the same, and should cause a copy of the application, together with the prescribed notice, to be issued and

* It is, at the present time, under consideration to deal similarly with the commission levied on sales in execution of decree, the pay of officials affected being re-adjusted on this basis.

served in the manner described in section 347 on the creditors or judgment-debtor, as the case may be. The court may also, if it thinks fit, cause a like notice to be issued and served under section 348 upon any person claiming to be a creditor of the applicant.

In the case of an application by a creditor, under section 353 of the Code, notices should similarly be served on the insolvent and other creditors, whose objections must be heard. Forms of notices under these sections are prescribed by the rules.

- (b.) The process fees leviable in respect of notices issued under section 347, section 348 or section 353, respectively, of the Code of Civil Procedure, are regulated by rules III and IV of the rules contained in Circular CXXXII of the volume of Judicial Circulars, third edition.
- (c.) If the judgment-debtor is in custody in pursuance of a warrant issued in execution of a decree, the court, has power, under section 349 of the Code, upon sufficient security being furnished, to direct his release. The rules state the nature of the security to be taken and prescribe forms for the necessary bonds.
- (d.) At the hearing of the application under section 350 of the Code the applicant should be exhaustively examined so as to ascertain fully the nature and extent of the liabilities. If it is found that creditors exist whose names are not on the application, the latter should be amended and the names added. Both the creditors and the judgment-debtor should be heard, and evidence offered by them, as to matters falling under section 351, should be taken.
- (e.) In passing orders under section 351, a definite finding should be recorded as to facts falling under clauses (a) to (d) of that section. Forms for orders under this section are provided by the rules.
- (f.) After making a declaration under section 351 and appointing a receiver, if there is property, the court should proceed to investigate the claims of creditors and to frame a schedule. Sections 352 and 353 prescribe the procedure under this head.
- (g.) Care should be taken to supervise the action of the receiver under sections 355 and 356 of the Code, and to issue necessary instructions and orders to him as to the realization of assets and conversion of property into money. The receiver's accounts should be periodically examined and passed by the court.
- (h.) The provisions of sections 351, 355 and 358 of the Code, as to the discharge of an insolvent, should be strictly followed. Forms for orders under these sections will be found in the rules.
- (i.) The provisions of sections 357 and 358 of the Code render an insolvent's property, whether acquired previously or subsequently to his insolvency, liable to attachment and sale, for the benefit of his creditors, by the court acting under chapter XX. If property not shown in the application or disclosed at the hearing is subsequently traced, it should be attached and sold, unless the scheduled creditors have been satisfied to the extent of one-third of their claims, or twelve years from the date of discharge, under section 351 or section 355, have expired.
- (j.) In passing sentence under section 359 the court should record a per finding setting forth the specific acts (falling under section) of which the applicant has been guilty. It should be remembered that this section is limited to the applicant and not apply to a judgment-debtor dealt with on the application.

creditor. A sentence of imprisonment can only be passed at the instance of a creditor, that is, in cases in which one or more of the creditors have pressed for an order under section 359.

RULES MADE BY THE CHIEF COURT UNDER THE POWERS CONFERRED BY SECTION 652 OF THE CODE OF CIVIL PROCEDURE, REGULATING THE CONDUCT OF PROCEEDINGS UNDER CHAPTER XX OF THE SAID CODE.

Part I.—Proceedings.

I.—The forms contained in the schedule annexed to these rules and hereinafter specified shall, so far as is possible, be used in proceedings under chapter XX of the Code of Civil Procedure :—

List of Forms.

<i>Notice to creditor, to accompany copy of the application, under section 347 or section 348</i>	... Forms I and II.
<i>Notice to creditor, under section 353</i>	... Form III.
<i>Security bond to be given by judgment-debtor for release from custody</i>	... Forms IV and V.
<i>Orders under section 351</i>	... Forms VI, VII and VIII.
<i>Schedule of creditors and debts under section 352</i>	... Form IX.
<i>Security bond to be given by receiver.</i>	... Form X.
<i>Certificate to be given by receiver under section 355</i>	... Form XI.
<i>Order of discharge under section 355</i>	... Form XII.
<i>Order of discharge under section 358</i>	... Form XIII.
<i>Order of imprisonment under section 359</i>	... Form XIV.

II.—If, in the exercise of the powers conferred by section 347 of the Code of Civil Procedure, the court considers that publication of the application is necessary, it shall record an order to that effect, and shall specify therein the gazette and newspapers (if any) in which such application is to be published, and the party from whom the cost of such publication is to be realized. Such party shall thereupon (if not exempted under the last clause of section 347) be required to deposit, within a specified time, such sum as may appear to be sufficient to cover the cost of such publication. Any sum remaining over out of the sum so deposited, after meeting the cost of such publication, shall, if the applicant is the judgment-debtor, be placed to the credit of the estate, and, if the applicant be a decree-holder, be refunded to him. If the amount deposited is found to be insufficient, the deficiency shall be realized from the person liable to pay it under the order referred to above.

III.—The security to be furnished by a judgment-debtor for release from custody, under section 349 of the Code, shall take the form of a joint and several security bond from the judgment-debtor himself and one or more approved sureties, as the court may determine. The security bond shall be in the form IV or the form V, as the case may be, of the schedule.

IV.—Every receiver appointed under section 351 of the Code of Civil Procedure, who is not a paid officer of the court, shall be required to give such security as the court may deem sufficient. The security may consist either of Government Promissory Notes deposited with or made payable to the court, or of a security bond from the receiver himself and one or more approved sureties, as the court may determine. The security bond shall be in the form X of the schedule. No officer of the court shall be appointed receiver who has not, in the ordinary official course, given security to the extent of not less than Rs. 500.

V.—Receivers appointed under section 351 of the Code may be remunerated by a commission not exceeding 5 per centum on the balance of the amount realized which is available for distribution. The rate of commission will be fixed by the court in each case with reference to the circumstances thereof. In cases in which a paid officer of the court is appointed receiver, the amount of the commission so fixed shall be placed in a fund, to be called the Insolvency Fund.

VI.—The court may at any time for sufficient cause, to be recorded in writing, remove any receiver appointed in any case and appoint another. The receiver shall, under section 356 of the Code, discharge his duties under the direct control of the court, and shall be required to

obtain the approval of the court to sales of property effected by him before such sales are finally confirmed; to the conduct of all suits and Judicial proceedings relating to the estates, and to all other important acts connected with the discharge of his duties.

Part II.—Estate Accounts.

VII.—Whenever any person is declared an insolvent under the provisions of section 351 of the Code of Civil Procedure and there are any assets, the court shall, if no non-official receiver is appointed, cause a ledger account (as hereinafter prescribed) to be opened in respect of the estate of such person. All sums received on account of the estate shall be shown on the credit side of such account, and all disbursements made on account of the estate shall be shown on the debit side of such account.

VIII.—A receipt shall be given for every sum realized or received on account of any insolvency proceeding: such receipt shall be in the form XIX monies received, and taken (prescribed for the receipt book) of the schedule, the counterfoil for all monies disbursed. being retained with the file. Similarly, a receipt shall be taken for every sum disbursed to any person on account of any insolvency proceeding: such receipt shall be in the form XX (prescribed for the disbursement book) of the schedule. The receipt taken shall be placed on the file, the counterfoil being retained by the disbursing officer pending the auditing of his accounts, after which it may be destroyed.

IX.—The accounts shall be balanced half-yearly and the last entry signed by the presiding officer of the court. A copy of the ledger account shall be made at the close of each year and placed with the file of the case to which it relates.

Part III.—Receiver's Accounts.

X.—Every receiver appointed under section 351 and acting under section 356 of the Code shall maintain a cash account and dividend register in respect of the estate of which he is appointed receiver. Such account and register shall, as nearly as may be, be in the forms XVI and XVIII, respectively, of the schedule.

XI.—Every sum received and every payment made by the receiver in respect of the estate shall be entered in the cash account; and every payment of a dividend to a creditor shall be shown in the dividend register. The receiver shall grant receipts for all sums received by him, and shall take receipts for all sums disbursed by him. All receipts granted by a receiver shall be headed in the cause and shall be signed with his name and designation as "Receiver in the Estate of—." The receipts shall be in the forms XIX and XX, respectively, of the schedule.

XII. The receiver's accounts and vouchers shall be exhibited to an officer of the court for examination and signature at least once every three months, and shall be passed and signed by the presiding officer of the court at least once in each calendar year and when the receiver's duties have terminated.

NOTE.—In cases in which a receiver is appointed who is not an official of the court, the accounts kept by the court, under rules XIII and XIV, will be limited to pecuniary transactions relating to the estate which actually pass through the hands of the court. The receiver's cash account and dividend register will thus form the only record of the receipts and disbursements on account of the estate, and should, accordingly, be very carefully supervised and controlled by the court,

Part IV.—Court Accounts and Procedure.

XIII.—(i). The rules for the time being in force relating to the deposit transactions of civil courts shall, so far as they may be applicable, be followed in regard to deposit transactions relating to insolvency proceedings; unclaimed deposits shall be dealt with under the same rules.

(ii). A *Pass Book* shall be maintained with the treasury, in which all deposits and withdrawals of money on account of insolvency proceedings shall be shown. A *Cash Account*, showing all receipts and disbursements on account of insolvency proceedings, shall also be maintained.

The *Pass Book* shall be in the form XV and the *Cash Account* in the form XVI of the schedule.

When cash to be credited. (iii). All cash in hand shall be credited in the treasury before the close of each month.*

* This is necessary in order that the monthly balance shown in the treasury accounts may tally with the court's accounts.

What officers to be entrusted with custody of money.

(iv). No officer of the court who has not given proper security may be entrusted with the custody of any money in the hands of the court; and no officer may be entrusted with a sum exceeding the amount of his security.

(v). All monies at credit of insolvent estates and not required for immediate disbursement shall be placed in the treasury until required to meet authorized disbursements. Money shall be drawn from the treasury by cheques signed by the presiding officer of the court whenever payments exceeding the sum in hand (if any) are to be made.

How money should be drawn from treasury and when.

(vi). Every payment into court shall be received by the chief ministerial officer of the court or by some proper officer in the presence of such chief ministerial officer. Every disbursement ordered by the court shall be made by the chief ministerial officer of the court or by some proper officer in the presence of such chief ministerial officer. The chief ministerial officer of the court shall attest every receipt granted for money paid into court, and every receipt taken for sums disbursed by the court, and shall cause the same to be duly entered in the cash book and accounts of the court as required by these rules.

Receipts and disbursements by whom to be made.

XIV.—A *Ledger Account* shall be maintained showing under a separate heading the transactions relating to each estate in regard to which an account is open, and of the Insolvency Fund (which shall, for the purposes of this rule, be treated as an estate). The entries from the cash book shall be posted under their proper heads in the ledger, weekly or oftener. Each ledger account shall be totalled monthly, and signed by the chief ministerial officer of the court, who shall be responsible that the totals of the ledger accounts correspond with those of the cash account and balance. An index shall be prefixed to the ledger indicating, in alphabetical order, the accounts entered in the ledger and the folio at which they will be found. The *Ledger Account* shall be in the form XVII of the schedule.

Ledger Account.

In the case of estates for which a non-official receiver has been appointed, a *Ledger Account* will be opened, and a monthly abstract of receipts and disbursements entered therein from the receiver's cash book. The balances being shown as in the hands of such non-official receiver, when not deposited in the treasury.

XV.—Every dividend declared in regard to any estate shall be entered in the register relating thereto. Each dividend sheet shall show in the heading thereof, under the signatures of the receiver (if any) and the presiding officer of the court, the following particulars, namely:—

Dividend Register.

- (a) the total amount of the scheduled debts;
- (b) the amount on which the dividend is declared;
- (c) the amount and rate of previous dividends (if any);
- (d) that amount to be distributed at such dividend and the rate *per centum* of the liabilities to be distributed.

In the body of every dividend sheet the following particulars shall be entered in respect of each person entitled to receive money under such dividend, namely:—

- (e) the total original amount due to such person as fixed by the court;
- (f) the amount (if any) paid to such person up to the date of such dividend, and the balance due;
- (g) the amount (if any) in deposit on behalf of such person but not actually paid on account of previous dividends, &c.;
- (h) the amount payable under such dividend;
- (i) the amount paid;
- (j) the date of payment;
- (k) the number of the voucher evidencing the payment;
- (l) the signature of the disbursing officer and payee.

The *Dividend Register* shall be in the form XVIII of the schedule.

XVI.—The presiding officer of the court shall examine the accounts of every estate at least once in six months and shall satisfy himself that such accounts are properly kept and that all items are properly vouched for. He shall similarly inspect once in each year or oftener the *pass book*, cash account and ledger, maintained in respect of all insolvency proceedings in his court, and shall enter the date of each such inspection and his signature in each account book inspected.

XVII.—When the account of any estate is closed or the duties of receiver have been concluded, an abstract account of the estate under the signatures of the receiver (if any) and presiding officer of the court

Closing of account.

shall be placed upon the file. Such abstract account shall show the total realizations and disbursements on account of the estate as well as a detail of—

- (a) outstandings due to or by the estate ;
- (b) unclaimed dividends ;
- (c) unrealized assets.

XVIII.—An annual statement showing the action taken in regard to each estate shall be submitted to the Chief Court, through the Divisional Court, on or before the fifteenth of February of the year succeeding that in which it relates. Such statement shall be in the form XXI of the schedule. Every estate shall be shown in this statement until the assets made over by the insolvent judgment-debtor or attached by the court have been realized and distributed or otherwise disposed of and the account has been closed by the court. Should scheduled debts remain unsatisfied and an asset be subsequently discovered on account of any estate the accounts of which have been closed, such estate should be again brought on to the statement until such assets have been completely realized and distributed.

XIX.*—When the property of any insolvent is sold under the orders of the court, or the receiver proceeds to convert the property of an insolvent into money, under section 356, clause (a), of the Code, the court shall fix, the amount to be deducted from the proceeds of such property to cover the expenses of such sale or conversion. The amount so fixed shall not exceed—

when the property sold realizes Rs. 5,000 or less,—five per centum on the amount realized ;

when the property sold realizes more than Rs. 5,000,—five per centum on the first five thousand and one-half per centum on the remainder.

XX.—The amount of commission allowed under rule V in cases in which a paid officer of the Court is appointed receiver, and all sums realized under rule XIX, shall be paid into the Insolvency Fund of the court.†

XXI.—(i). The following charges shall be borne by the Insolvency Fund formed under the preceding rule, namely.—

- (1) the actual expenses incurred in conducting sales of the property of insolvents or of converting such property into money ;
- (2) the cost of any special establishment employed in conducting insolvency business ;
- (3) miscellaneous charges, such as providing forms, account books and registers for the purposes of insolvency business.†
- (ii). No charges falling under the second and third heads of the preceding clause of this rule shall be incurred without the previous sanction of the Divisional Judge, and, in the case of charges falling under the second head, the approval of the Chief Court.

(iii). An abstract account of the income and expenditure of the Insolvency Fund, showing the income and expenditure under each head specified in rules XX and XXI, shall be submitted annually to the Chief Court, through the Divisional Court, for information, on or before the 15th of February of the year succeeding that to which it relates. Such statement shall be in the form XXII of the schedule.

SCHEDULE OF FORMS.

FORM 1.—(vide RULE 1.)

Notice under section 347 of the Code of Civil Procedure to decree-holder or his pleader ; to creditors (if any) ; or to judgment-debtor or his pleader.

In the Court of the _____
of _____

* This rule is made under the second clause of section 652 of the Code and has received the sanction of the Local Government.—No. 385 (Home—Judicial), dated the 7th April 1892.

† See note to rule XIX.

(INSOLVENCY JURISDICTION.)

Case No. _____ of 189 .

IN THE MATTER of the insolvency of _____
son of _____resident of _____
To _____

WHEREAS _____ residing or in custody at _____
has made application to this court under section 344 of the Code of Civil Procedure to be declared an insolvent: NOTICE is hereby given to you that the said application of the said _____ will be heard at _____ on the _____ day of _____ 189 , at _____ of the clock in the _____ noon.

A copy of the said application is forwarded for information.

Given under my hand and the seal of the court this _____ day of _____ in the year 189 .

Seal.

Judge.

FORM II.—(vide RULE I.)

(TITLE AS IN FORM I.)

WHEREAS _____ son of _____ residing at _____ has made application to this court under the second clause of section 344 of the Code of Civil Procedure for an order declaring _____ residing or in custody at _____ an insolvent (or, in case the notice is addressed to the judgment-debtor, "that you be adjudicated an insolvent"):

NOTICE is hereby given to you that the said application of the said _____ will be heard at _____ on the _____ day of _____ 189 . , at _____ of the clock in the _____ noon.

A copy of the said application is forwarded for information.

Given under my hand and the seal of the court this _____ day of _____ in the year 189 ,

Seal.

Judge.

FORM III.—(vide RULE I.)

Notice under section 353 of the Code of Civil Procedure, to the other creditors, if any, and to the Insolvent.

(TITLE AS IN FORM I.)

WHEREAS _____ a creditor of _____ has made application to this court for an order that * _____ and WHEREAS this court has decided to hear the same and has fixed the _____ day of _____ in the year 189 , at _____ of the clock in the _____ noon for that purpose: NOTICE is accordingly given to you under the provisions of section 353 of the Code of Civil Procedure to show cause, if so advised, why an order granting the prayer contained in the said application should not be made.

Given under my hand and the seal of the court this _____ day of _____ 189 , at _____

Seal.

Judge.

FORM IV.—(vide RULE I.)

Security bond for release of judgment-debtor from custody under section 349 of the Code of Civil Procedure.

(TITLE AS IN FORM I.)

Know all men by these presents, that we _____ of _____ and _____ of _____ and _____ of _____

* Here enter the precise nature of the application; that is, whether it is an application for inclusion name in the schedule, &c.,—see section 353 of the Civil Procedure Code for other grounds.

are jointly and severally held and firmly bound to _____ Judge of the _____ court at _____ in the sum of _____ rupees, to be paid to the said _____ or his successors, or assigns or his or their certain attorney or attorneys, for which payment to be made we bind ourselves and each and every of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and dated this _____ day of _____ one thousand eight hundred and _____
Signatures of executants and witnesses.

WHEREAS an application for an order declaring the above bounden _____ an insolvent is pending before the Judge of the _____ court at _____; and WHEREAS the _____ day of _____ in the year 189 _____, has been fixed for hearing the same; and WHEREAS the above bounden _____ has been cited to appear before the Judge of the _____ court aforesaid to answer the said application on the date aforesaid; and WHEREAS the above bounden _____ is at the present time in custody in pursuance of a writ issued from the court of the said Judge.

Now therefore the condition of this obligation is such that if the above bounden _____ do appear before the Judge of the _____ court at _____ on the _____ day of _____ in the year 189 _____, and on such subsequent day or days as may be fixed by the court from time to time, to answer to the application for an order declaring him an insolvent, this obligation shall be void, otherwise it shall remain and continue in full force.

Signatures of executants and witnesses.

Approved.

Judge.

Date _____

FORM V—(vide RULE I.)

(TITLE AS IN FORM I. PREAMBLE AS IN FORM IV.)

WHEREAS the above bounden _____ has made application to the Judge of the _____ court at _____ for an order declaring him to be an insolvent; and WHEREAS the _____ day of _____ 189 _____, has been fixed by the said Judge for the hearing of the same; and WHEREAS the above bounden _____ has been cited to appear before the said Judge on the date _____ aforesaid; and WHEREAS the above bounden _____ is at the present time in custody in pursuance of a writ issued from the court of the said Judge.

The rest as in Form IV.

FORM VI—(vide RULE I.)

Order under section 351 of the Civil Procedure Code, declaring a person to be an Insolvent.
 (TITLE AS IN FORM I.)

WHEREAS upon inquiry made upon the application of _____ dated the _____ 189 _____, the court is satisfied that the statements contained in the application are substantially true, and that the said _____ judgment-debtor has not committed any act of bad faith within the meaning of section 351 of the Code of Civil Procedure:

IT IS ORDERED that the said _____ judgment-debtor be and he hereby is declared insolvent

Dated this _____ day of _____ 189 _____.

Judge.

FORM VII—(vide RULE I.)

Order under Section 351 of the Civil Procedure Code, appointing a Receiver.
 (TITLE AS IN FORM I.)

WHEREAS upon the hearing of the application of _____, dated the _____, 189 _____, praying that _____ be declared insolvent, an order was made by the court on the _____ 189 _____, granting the said application and recording a declaration accordingly: and

WHEREAS it appears to the court to be necessary to appoint a receiver of the property of the said insolvent: IT IS HEREBY ordered that _____ of _____ be and he is hereby appointed receiver of the estate of the said debtor.

Dated this _____ day of _____ 189 _____.

Seal.

Judge.

FORM VIII—(vide RULE I.)

Order of discharge under section 351 of the Civil Procedure Code.

(TITLE AS IN FORM I.)

WHEREAS upon the hearing of the application of _____ dated the _____ 189 , praying that _____ be declared insolvent, an order was made by the court on the _____ 189 , granting the said application and recording a declaration accordingly : and—

WHEREAS the said court has not appointed a receiver of the estate of the said insolvent and—

WHEREAS it appears to the said court that the said insolvent may be discharged :

IT IS ORDERED that _____ the insolvent aforesaid be and he hereby is discharged.

Dated this _____ day of _____ 189 .

Seal.

Judge.

FORM IX—(vide RULE I.)

FORM OF SCHEDULE UNDER SECTION 352 OF THE CIVIL PROCEDURE CODE.

*Liabilities.**I.—Debts due by the Insolvent.*

Number.	Name, description and residence of creditor.			Amount of debt found due.		Whether secured or unsecured, and nature of security.	Date of order directing entry on schedule.	Nature of the debt and securities, if any.
	Name.	Address.	Residence.	Rs.	A. P.			

NOTE.—Where there are cross demands, the amount due to the creditor will be shown under *liabilities*, and the amount due to the estate under *assets*.

*Assets.**A.—Debts due to the insolvent.*

Number.	Name, description and residence of debtor.			Amount.		When contracted.	Good, bad, or doubtful.	Nature and consideration of the debt; also securities (if any) for the same.	Order passed by the court as to its realization or disposal.
	Name.	Address.	Residence.	Rs.	A. P.				

FORM X.—(vide RULE I.)

Security bond from receiver.

(TITLE AS IN FORM I.)

KNOW all men by these presents that we _____ of _____ and _____ of _____ and _____ of _____ are jointly and severally held and firmly bound to _____ Judge of the _____ court at _____ in the sum of _____ rupees, to be paid to the said _____ or his successors or assigns, or his or their certain attorney or attorneys, for which payment to be made we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and dated the _____ day of _____ 189 .

(Signature of executants and witnesses.)

WHEREAS an order, dated _____ has been made by the court aforesaid, declaring _____ an insolvent; and WHEREAS the said court has made a receiving order against the said _____ insolvent: and WHEREAS the above bounden _____ has been appointed receiver of the estate of the said _____ insolvent;

NOW THEREFORE the condition of this obligation is such that if the above bounden _____ do commit any act whereby any pecuniary loss or damage is caused to the estate of the said _____ insolvent, or shall be guilty of any other misconduct in the discharge of his duties as such receiver, whereby he is unable duly to account for money or monies, or property or properties, received by him on account of the estate of the said _____ insolvent, this obligation shall remain and continue in full force, otherwise the same shall be null and become void.

(Signatures of executants and witnesses.)

FORM XI.—(vide RULE I.)

Certificate by receiver under section 355 of the Civil Procedure Code.

(TITLE AS IN FORM I.)

WHEREAS by an order issued out of this court on the _____ day of _____ 189 , I _____ was appointed receiver of the estate of _____ insolvent, I do hereby certify and attest that the said insolvent has placed me in possession of all his property as set forth in the schedule of assets [and has done everything in his power for that purpose.]

Dated this _____ day of _____ 189 .

Receiver.

FORM XII.—(vide RULE I.)

Order of discharge under section 355 of the Civil Procedure Code.

(TITLE AS IN FORM I.)

WHEREAS _____ the judgment-debtor above-named was by an order of this court dated the _____ day of _____ 189 , declared insolvent; and WHEREAS the court appointed a receiver of the estate of the said insolvent; and WHEREAS the said receiver has certified to the said court that the said insolvent has placed the said receiver in possession of all his property as detailed in the schedule of assets and has done everything in his power for that purpose:

IT IS ORDERED that the said insolvent be and he hereby is discharged (or it is ordered that the said insolvent be, and he is hereby discharged subject to the following conditions), namely:—

Dated this _____ day of _____ 189 .

Seal.

Judge.

FORM XIII—(Vide RULE I.)

Order under section 358 of the Civil Procedure Code, absolving discharged insolvent from further liability.

(TITLE AS IN FORM I.)

WHEREAS _____ the debtor above-named was on the _____ day of _____ 189 , declared insolvent ; and WHEREAS on the _____ day of _____ 189 , he was discharged ; and WHEREAS—(1) the scheduled debts have been duly satisfied to the extent of one-third ; or (2) the period of twelve years has expired from the date of making the order of discharge aforesaid : or (3) the aggregate amount of the scheduled debts is Rs. 200 or less,—and the court considers that he should be absolved from further liability :

It is ORDERED that the said insolvent debtor be, and he is hereby absolved from further liability in respect of all debts entered in the schedule marked A and attached to the order.

Dated this _____ day of _____ 189 .

Seal.

Judge.

FORM XIV—(vide RULE I.)

Order sentencing a person to imprisonment under Section 359 of the Civil Procedure Code.

(TITLE AS IN FORM I.)

WHEREAS it has been proved to the satisfaction of the court that _____ judgment-debtor in the case above cited has, in his application to be declared an insolvent dated the _____ 189 :

- (a) been guilty of concealment, or has wilfully made a false statement as to the debts due by him, or respecting the property belonging to him ;
- (b) fraudulently concealed, transferred, or removed any property belonging to him ; or
- (c) committed an act of bad faith regarding the matter of the application, that is to say has

[Here set out the particular act or acts of bad faith.]

It is HEREBY ORDERED that he, the said judgment-debtor, be simply (or rigorously) imprisoned for a term of

Dated this _____ day of _____ 189 .

Seal.

Judge.

FORM XV.—(vide RULE XXII.)

PASS BOOK.

In the Court of the

(Insolvency Jurisdiction).

of

ACCOUNT CURRENT WITH THE CIVIL TREASURY AT _____

Dr.

Cr.

Date.	Amount.	Total.	Date.	Amount.	Total.	Signature of Presiding officer.
7th Jany. 18 .	To RECEIPTS—			By BALANCE—		
16th Jany. 18 .	Cash drawn from Treasury on Cheque No.			Held in deposit from previous account. 		
	Ditto ditto. 			By REMITTANCES—		
	To BALANCE—		7th Jany. 18 .	Cash remitted to Treasury with Invoice No. 		
	Cash held in deposit in Treas- ury at the close of... ..		20th Jany. 18 .	Ditto ditto 		
	Total Rs. 			Total Rs. 		

FORM XVIII.—(Vide Rule XV.)

DIVIDEND REGISTER.

(Heading and form of each dividend sheet entered in the Register).

*In the Court of the**of**(Insolvency Jurisdiction).*

IN THE MATTER OF THE ESTATE OF

INSOLVENT, CASE No.

OF 189 .

FIRST (or as the case may be) DIVIDEND DECLARED ON THE

Total amount of scheduled debts, Rs.

Amount on which dividend is declared, Rs.

Amount of previous dividends, Rs.

Rate of previous dividends

Amount now to be distributed, Rs.

Rate per centum on liabilities.

Serial number of creditor.	Schedule number of creditor.	Name of creditor.	Original amount of debt admitted to Schedule.	Amount paid therefrom up to date of this dividend.	Balance due to creditor.	Amount in deposit on behalf of each creditor on account of previous dividends not actually paid.	Amount payable under this dividend.	Total amount at credit for creditor.	Amount paid.	Date of payment.	Number of Voucher evidencing payment.	Balance still due to creditor.	Signature of disbursing Officer.	Signature of creditor or his authorized agent.	REMARKS.
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RECEIPT BOOK.

No. _____ Counterfoil to be retained with the file.

In the Court of the _____
(Insolvency Jurisdiction.)

In the matter of the Insolvency of

Name of person making the payment

Case No. _____ of 189 .

Amount paid in

Dated

(Signature.)

(Official designation.)

RECEIPT BOOK.

No. _____ Form of receipt for sums received by the court, to be given to the person making the payment.

In the Court of the _____

(Insolvency Jurisdiction.)

In the matter of the Insolvency of

Case No. _____ of 189 .

Received from

the sum of rupees (in words)

on account of the above estate.

Dated this _____ day of _____ 18 .

Rs.

(Signature.)

(Official designation.)

FORM XX—(vide RULE VIII.)

DISBURSEMENT BOOK.

No.—— Counterfoil to be retained with the file.

In the Court of the of

In the matter of the Insolvency of

Received from

the sum of rupees

on account of the above estate.

Dated

(Signature).

DISBURSEMENT BOOK.

No.——Form of receipt to be taken from every person to whom a payment is made.
This receipt should be retained by the disbursing officer.

In the Court of the of

In the matter of the Insolvency of

Received from

(Name)

(official designation)

of

the Court of

the sum of

rupees (in words)

on account of the above estate.

Dated this

day of

189.

(Signature)

FORM XXI--(vide Rule XVIII.)

Annual Statement showing action taken in regard to each Estate.

1	Name of Insolvent.	
2	No. and date of application.	
3	Date of Court's order declaring insolvency.	
4	Amount of scheduled debts.	
5	Estimated value of assets.	
6	Amount of assets actually realized.	
7	Amount paid.	Cost of sale or conversion of property.
		On account payments to Government.
		Decree-holder's costs.
		Debts secured by mortgage.
		Dividends to creditors.
		Receiver's commission on balance available for distribution.
		Total paid otherwise than in dividends.
8	Amount paid on account of dividends.	
9	Balance to credit of Estate.	
10	Liabilities outstanding.	
11	Estimated value of assets yet unrealized.	

CIRCULAR MEMO. No. 9--1883 G. OF 1892.

To

ALL DIVISIONAL AND SESSIONS JUDGES, DISTRICT MAGISTRATES AND DISTRICT JUDGES IN THE PUNJAB.

Dated 5th May 1892.

In modification of paragraphs 3 and 4 of Judicial Circular No. CXLIH of the Volume of Judicial Circulars, 3rd edition, regarding the dates for the submission of the Annual Criminal and Civil Reports and Statements, the following dates have now been fixed for their submission, with reference to the orders of Government marginally noted:—

SUBJECT.

Alteration in the dates for the submission of the Annual Criminal and Civil Reports and Statements.

No. 442 A., dated the 14th April 1892.

Civ i.

District Judges' Reports and Returns ... 1st February.
Divisional Judges' ditto ... 15th February.

Criminal.

District Magistrates' Reports and Returns ... 15th February.
Sessions Judges' ditto ... 1st March.

GENERAL LETTER No. 2108 G. OF 1892.

To

Dated the 16th May 1892.

THE Publishers of the *Punjab Record* have brought to notice that unless officers supplied with copies intimate to them, at the earliest opportunity, the non-receipt of numbers of the

SUBJECT.

Supply of *Punjab Record*—non-receipt of copies to be promptly brought to notice.

Record despatched to them, they will not be prepared to replace missing numbers except upon payment for the extra copies supplied. Officers are accordingly requested to inform both the publisher (*Civil and Military Gazette*) and this office, as soon as possible after numbers become due, if they are not received.

CIRCULAR MEMO No. 10—2474 G. OF 1892.

To

ALL DISTRICT JUDGES IN THE PUNJAB.

Dated the 10th June 1892.

SEVERAL instances have occurred recently in which the keys of the iron safes

SUBJECT.

Custody of the keys of safes provided for wills.

provided for the custody of wills in districts, under the rules contained in Punjab Government Notification No. 490 S, dated the 29th June 1885, have been lost or mislaid; and in each instance it has been found impossible to fix the responsibility of the loss on any particular officer, as the charge of the keys has not been formally transferred when changes of District Judges have taken place. Much inconvenience has resulted, and the Government has been put to considerable expense.

2. Each safe is provided with duplicate keys, one of which should be retained in the custody of the District Judge, the other being placed in a secure sealed cover and deposited in the District Treasury Strong Room, and the Treasurer's receipt for it filed in the District Judge's office. When a District Judge is transferred he should make over the key of the safe and the Treasurer's receipt for the duplicate, to his successor, and record that he has done so on the transfer of charge papers sent to the Chief Court.

In future the District Judge for the time being will be held strictly responsible for the keys of the safe, and any officer taking over charge of the office of District Judge without taking over the keys or reporting that they have not been made over, will be brought to account if at any time the keys are not forthcoming, and may have to bear the cost incurred by Government in having the safe broken open or in providing a new one.

3. If a key is lost, the fact should at once be reported to the Chief Court with a full explanation of the circumstances.

ADDENDA ET CORRIGENDA.

The 13th June 1892.

No. 2505 G.—Substitute the following for Book Circular No. 11—1011 G., dated the 26th February 1891 :—

BOOK CIRCULAR No. 11—1011 G. of 1892.

To

ALL DIVISIONAL JUDGES AND JUDGES OF COURTS OF SMALL CAUSES IN THE
PUNJAB.

Dated 26th February 1892.

SUBJECT.

Record Office Funds of
Divisional Courts and Small
Cause Courts.

THE following instructions are to be observed by Divisional Courts and Small Cause Courts in regard to the management of the income and expenditure of the Record Office Funds relating to those courts.

2. In the Court's General Letter No. 1228, dated the 12th March 1889, to the address of Divisional Judges, instructions were issued in regard to the Incorporated Local Funds (or Record Office Funds) of their courts. Those instructions will in future, and with effect from the 1st April 1891, be applied in the manner here prescribed also to Small Cause Courts constituted under the Provincial Small Cause Courts Act, 1887, or the Cantonment Act, 1889. Provincial Small Cause Courts have been placed under the direct control of Divisional Courts by Punjab Government Notification No. 510, dated the 11th May 1887; and their Record Offices and the income on account of those offices must, therefore, be placed under the control of Divisional Courts.

3. The income derived from :—
Income, how to be credited.

- (1) inspection fees, levied under the authority of Circular CXXVII of the Volume of Judicial Circulars, 3rd edition;
- (2) record office fees, levied under the authority of Book Circular No. III—2378 G., dated the 15th May 1890 (paragraph 10 and Rule VII); and from

(3) sales of waste paper; in each Divisional Court and in every Small Cause Court subordinate thereto (whether situated in a Cantonment or at the head-quarters of a Civil District), should, under the authority quoted in the margin, all be paid into the Treasury to the credit of the Record Office Fund, or (as it is called by the Accounts Department) the Incorporated Local Fund of such Divisional Court.

Punjab Government No. 1855, dated 17th August 1887.
 Punjab Government No. 1787, dated 12th September 1889.
 Punjab Government No. 388, dated 20th February 1891.
 Accountant-General's Circular, new series No. 84 L. F., dated the 12th September 1887.

4. Divisional Judges are authorized to sanction expenditure from the fund thus constituted, falling under any of the following heads, whether on account of their own courts or on account of any Small Cause Court subordinate to them:—

- (1) facilitating the inspection of records;
- (2) meeting the comfort and convenience of the litigating public;
- (3) effecting improvements in the Record Office of the Divisional Court or of any Small Cause Court subordinate to it; and
- (4) providing for the care of court libraries.

5. The Government has ruled that expenditure on account of *keeping the court grounds in proper order* may be considered as falling under head 2 of paragraph 4. Such expenditure should, however, be limited to meeting the cost of the necessary garden establishment in excess of what can be met from sale of produce and other available sources.

Expenditure on account of keeping the court grounds in proper order to be considered as falling under head 2, paragraph 4.

6. Books, furniture and similar charges which should ordinarily be borne by the allotment for judicial contingencies, and charges for the construction or repairs of buildings which should ordinarily be borne by the Public Works Department, are not to be incurred from the Record Office Fund. Under head 4 of paragraph 4, Clerks of Divisional Courts may be allowed an amount not exceeding 5 per cent. upon the surplus income of such court left after defraying the cost of necessary establishments, and not exceeding Rs. 10 per mensem in any case for looking after Divisional Court libraries.

Heads under which expenditure should not be incurred from the Record Office Fund specified.

7. Divisional Judges will be held personally responsible that no expenditure from the fund, not coming strictly within the heads specified in paragraph 4, is sanctioned or permitted.

Divisional Judges responsible that no expenditure is incurred except under sanctioned heads.

8. All cheques drawn against the Record Office Fund of a Divisional Court will be signed by the Divisional Judge.

All cheques to be signed by Divisional Judge.

9. The Divisional Judge will keep an account of the fund and will submit a copy of the account at the close of each quarter to the Registrar of the Chief Court, for the information of the Chief Court. Any expenditure not authorized by these instructions will be disallowed by the Chief Court.

Account to be kept by Divisional Judge, and copy submitted quarterly to Registrar, Chief Court, for audit.

10. Judges of Small Cause Courts desiring sanction to any expenditure from the fund will apply to the Divisional Judge to whom they are subordinate, and it will rest with him to sanction or disallow such expenditure.

Expenditure of Small Cause Courts to be sanctioned by Divisional Judges.

11. It will be the duty of Divisional Judges to see that income falling under the heads specified in paragraph 3 of these instructions is duly credited to the Record Office Fund of the court by Small Cause Courts as well as by their own courts.

Duty of Divisional Judge to see that all income is duly credited.

12. At the close of each financial year, namely, on the 31st March, the amount at credit of the fund of each Divisional Court in excess of Rs. 150 will be forthwith credited to Government by the Divisional Judge. If, for any sufficient reason, a Divisional Judge consider it necessary to retain the whole or any portion of the closing balance in the fund, in excess of Rs. 150, in order to meet special expenditure, he must obtain the previous sanction of Government (through the Chief Court) for the purpose.

Amount at credit at close of year in excess of Rs. 150 to be credited to Government.

13. As it is undesirable to continue to levy fees in excess of what may be sufficient to meet all proper expenditure under the heads already noted, it is necessary that Divisional Judges should, from time to time, consider the wants of their respective Courts and of the Small Cause Courts subordinate to them, and appoint the necessary establishments, in order that full advantage may be taken of the income to improve the Record Offices of the courts concerned, and to meet the convenience of the litigating public.

Divisional Courts to consider the wants of each Court and appoint the necessary establishments in order that full advantage may be taken of the income to improve Record Offices and meet the convenience of the litigating public.

14. It is not intended that expenditure which would in the ordinary course be met from the sanctioned budget estimates should be incurred from the Record Office Funds of Divisional Courts; the object is to provide such additional establishments and conveniences as may be found necessary in the interest of the litigating public.

The fund is not intended to meet expenditure ordinarily payable to sanctioned budget allotments.

15. The account to be maintained in Divisional Courts should be in the annexed form. A copy of the entire account should reach the Registrar within fifteen days of the close of each quarter. This account will be examined in the Chief Court office in order to see that the expenditure incurred is permissible under paragraph 4, and that these instructions have been duly observed. A cash-book of income and expenditure should be kept up by the Clerk of the Divisional Court and signed by the Divisional Judge weekly or oftener. The cheque-book should remain in the custody of the Divisional Judge.

Form of account. Copy to reach Registrar within 15 days of the close of each quarter. Cash book to be maintained and signed by Divisional Judge. Cheque-book to be kept by Divisional Judge. Income to be promptly paid into Treasury.

All income should, when possible, be sent daily to the Treasury; under no circumstances should it be transmitted later than on the working day succeeding that on which it is received.

16. At the close each of financial year (31st March) an *abstract account* for the whole year will be submitted to the Registrar of the Chief Court, showing the annual income grouped under the three heads of (1) Inspection Fees, (2) Record Office Fees, and (3) Sales of waste paper; and the annual expenditure grouped under (1) Establishments, and (2) Other charges.

Annual abstract account.

17. At the close of each month a balance should be struck and verified by reference to the Treasury Officer.

Monthly balance to be struck and verified.

18. Proper vouchers should be kept supporting expenditure. Each item of income should be supported by the Treasury receipt. Proper vouchers to be maintained. Monthly list to be submitted by each Small Cause Court to Divisional Court showing sums paid into Treasury. Treasury receipts.

19. **Cheque-books, account-books and forms required for the purposes of**
Supply of cheque-books, Record Office Funds should be provided at the cost of
account-books and forms. those funds, and should be charged accordingly.

Record Office Fund of the Divisional Court at

[illegible]

NOTE.—In order to enable the Chief Court to check the account, the balance should be verified by reference to the Treasury Officer, and initialled by the Divisional Judge ; and each item of receipt and expenditure should be separately entered, the court to which the item relates being specified.

BOOK CIRCULAR No. III—2763 OF 1892.

To

ALL CIVIL COURTS IN THE PENJAB.

Dated 28th June 1892.

It having been brought to the notice of the Judges that standing revenue records were not always made freely available to Civil Courts by District Revenue authorities, the matter has been under the consideration of the Financial Commissioners and Judges.

Circulars in which existing orders on the subject are contained quoted. Principles laid down.

- * { Judicial Circular, 3rd edition, Nos. II, XVIII and XIX.
- { Book Circular No. X of 1888.

2. The existing orders on the subject are contained in the Circulars noted in the margin,* the principles laid down being that—

- (a) Where the parties to a suit relied on particular entries in the standing record-of-rights or other records maintained in the Revenue Department relating to, and certified copies or extracts of, all relevant entries should, as far as possible, be placed on the record.
- (b) The original records should not be called for unnecessarily by, but should be freely available to, the courts.
- (c) Appellate Courts should insist on Subordinate Courts complying with these instructions, and should themselves not call for original records more frequently than is absolutely necessary.
- (d) A statement relating to land or interests in land in litigation taken from the revenue records and annual *jama bandi*, supplied and verified by the Patwari, should accompany the plaint, together with a proper map of all specific plots in suit.

3. These instructions have, on the one hand, not always been fully observed by Civil Courts, and, on the other, have been understood by certain District Revenue authorities as justifying them in placing difficulties in the way of Civil Courts having free and convenient access to revenue records.

4. Where Civil Courts neglect to make the parties supply proper copies or extracts of relevant entries, inconvenience is caused (1) to the Revenue authorities in being required to produce original records unnecessarily, and (2) to Appellate Courts from the fact that all evidence necessary for a proper decision of the case is not actually on the record, and that references are made to revenue records, which must be called for before the appeal can be decided. The revenue records themselves, moreover, often sustain injury in being sent from court to court, while the work of the Revenue Department may be delayed by their records being retained for long periods by Civil Courts. At the same time the Revenue authorities of districts should clearly understand that one of the chief objects of the more important standing records-of-rights is to supply reliable evidence for the decision of land suits by Civil Courts; that the requirements of such courts must be complied with; and that such records must be freely available to courts engaged in investigating and deciding questions affecting land or interests in land.

5. The Chief Court will be prepared to take proper notice of the action of any Civil Court which disregards its directions as to the manner in which original revenue records are to be referred to, and Deputy Commissioners (as Collectors) should bring to the notice of the Chief Court, through the usual channel, the case of any officer who systematically fails to comply with the orders on the subject.

References to instructions laid down by the Financial Commissioners on the subject.

6. In their Circular No. 3 of 1892 the Financial Commissioners have, with the concurrence of the Judges, laid down full instructions for the guidance of Revenue Officers in regard to—

- (1) Securing free access by the courts to revenue records,

- (2) The proper custody of such records when sent for perusal of the courts.

These instructions, so far as they concern the Civil Courts, may be thus stated—

- (1) The District Kanungo will be made responsible for complying with the requisition of the courts for the record-of-rights, and will himself, or through an assistant, produce the record in court, and be responsible for its custody and safe return, subject to the orders of the court, in regard to courts situated at the head-quarters of the district.
- (2) Where the court is at the tahsil head-quarters, the Tahsil Office Kanungo will produce in court either the District Record Office copy or Patwari's copy.
- (3) Where the court is neither at the district nor at the tahsil head-quarters, the Patwari of the Circle should attend in court and produce his copy of the record.

Instructions for the guidance of Civil Courts in referring to revenue records.

7. The Judges are pleased to issue the following instructions for the guidance of Civil Courts in referring to revenue records :—

- (i) All requisitions of District Courts for the production of original revenue records should be addressed to the District Kanungo, who will take measures to have them complied with in accordance with the orders issued by the Financial Commissioners.
- (ii) Requisitions by Divisional Courts or the Chief Court for original records will be addressed to the Deputy Commissioner, who will take measures to transmit the records to the Court calling for them. Such court will be responsible for the safe custody of the record, and if, in any case, a record is found to have been damaged in the Chief Court or a Divisional Court, the Deputy Commissioner will report the fact to the Court concerned and to the Financial Commissioners within 24 hours of its being returned.
- (iii) Original records produced in courts of first instance in districts will not be detained by such courts, and if the necessary inspection cannot be made at the time any record is produced by the proper Revenue official, the court will direct the official to produce it again on such date and at such time as may be convenient to the court.
- (iv) The Revenue official producing the record will render all necessary assistance in tracing out entries required by the court.
- (v) A Civil Court should not hesitate to call for the original revenue record where it is really necessary to do so for the purposes of the inquiry pending before it. Where, however, reference, to various parts of the record is not necessary, and the requisite evidence consists of entries of which certified copies or extracts can conveniently be obtained by the parties, the original record should not be called for without good reason. The matter is one for the exercise of much discretion in each particular case.
- (vi) In every case it is the duty of the court to insist—

- (a) On the plaintiff filing with the plaint the statement required by Rule II of the Rules contained in Judicial Circular No. II quoted below :—

“ Every such plaint shall be accompanied by a statement in the prescribed form (Civil Form No. CXIII) setting forth the particulars thereto relating, recorded in the Settlement record and the last annual *jamabandi*. This statement shall be verified by the signature of the Patwari of the Circle in which such land is situate. Where, by reason of partition, river action, or other cause, the entries in the Settlement record and the last annual *jamabandi* do not accord, a brief explanation of the reason should be entered in the final column of remarks. Where the suit is for a specific plot with definite boundaries, it shall also be accompanied by a map drawn to scale, showing clearly the specific plot claimed, or in relation to which the decree is made, and so much of the fields adjoining also drawn to scale as may be sufficient to facilitate identification. The specific point and adjoining fields shall be numbered in accordance with the statement, and the map shall be certified as correct by the Patwari who prepared it. Where the suit is for a share, or for various scattered fields, a map will not be necessary.”

- (b) On each party filing certified copies or extracts of all relevant entries on which they rely.

When this has been done, and the record of evidence has been completed accordingly, if the Court finds it necessary to check or verify the contents of such copies or extracts by the original records, owing to any doubt or difficulty which may arise, or to refer to other parts of the revenue records for information which may be indicated by the parties or by the nature of the records themselves, or to refer to entries regarding other parties which may throw light on the enquiry, the original record may properly be called for.

- (vii) Appellate Courts should refrain from calling for original records unless it is absolutely necessary for a determination of the case, and, if the necessity arises from the neglect of a court of first instance to comply with the instructions here issued, such court should be severely dealt with by the Appellate court in the exercise of the functions of administrative control vested in it.

These instructions supersede those contained in Judicial Circular No. XVIII and Book Circular No. X of 1888.

Circular Order of Financial Commissioners appended.

8. These instructions supersede those contained in Judicial Circular (3rd Edition) No. XVIII and Book Circular No. X of 1888. Judicial Circular No. XIX (as to the summoning of Patwaris) is not affected.

9. The Circular Order of the Financial Commissioners is appended for facility of reference.

Copy of Financial Commissioner, Punjab's Circular No. 3 of 1892, to the address of all Commissioners, Deputy Commissioners and Settlement Officers in the Punjab.

IN consultation with the Judges of the Chief Court the Financial Commissioner has recently been considering what measures are necessary to provide for the due requirements of the Courts where inspection of the standing or annual record-of-rights (Punjab Land Revenue Act, Chapter IV) is necessary for the disposal of land cases, and at the same time to guard against such records being detained longer than is necessary out of the record-room, and to secure them against damage when not in the custody of the Record-keeper. Among other proposals that have been made it has been suggested that a third copy of the standing record-of-rights or of certain portions of it should be prepared for the special use of the courts. It has also been proposed that a special official, to be called the Judicial Kanungo, should be appointed in every district, whose duty it should be to produce records in Courts and to answer calls from the Courts. After consulting Commissioners and Deputy Commissioners the Financial Commissioner has come to the conclusion that the preparation of a third copy of the record-of-rights or any portion

of it is unnecessary, and that the appointment of a Judicial Kanngo in every district cannot be justified, though it may be desirable to strengthen the record office establishments to some districts. The Financial Commissioner thinks, however, that the following measures should be taken to secure the double object of—

- (1) free access by the Courts to revenue records ; and
- (2) the proper custody of such records when sent for the perusal of the courts.

2. Arrangements are now being made under the supervision of the Director of Land Records for the Sadar copies of all standing and annual records-of-rights being placed in the custody of the District Kanungo in a separate compartment of the record office, and the Financial Commissioner wishes to see this arrangement gradually carried out throughout the Province. Meanwhile it will be desirable to make the District Kanungo responsible for complying with the requisitions of the Courts for the record-of-rights : and if he needs assistance in this duty it should be provided, either by placing one of the Record Office Assistants at his disposal for this purpose, or if absolutely necessary, by proposal for entertaining an additional Assistant. It need hardly be remarked that such proposals will require ample justification. Where the Court requiring the record is at the head-quarters of the district, the Assistant entrusted with the duty should himself produce the record in Court, and be responsible for its custody and safe return, subject to the orders of the Court. Where the court is at the tahsil head-quarters, the Tahsil Office Kanungo should similarly produce in court the Patwari's copy of the record, or the District Office copy, which should be sent to the tahsil in the manner hereinafter provided. Where the Court is neither at the district nor at the tahsil head-quarters, the Patwari of the Circle should attend in court and produce his copy of the record.

3. Secondly, it is necessary that additional copies of the Rivaj-i-Am, where such a document exists, should be made for the use of the courts. This document generally applies to a whole district or to a large tract of country, and the labour involved in having extra copies made of it will be but slight. Where necessary the extra copies may be printed or lithographed, and in such cases copies should be supplied for the use of the District and Divisional Courts and of the Judges of the Chief Court.

4. Thirdly, records-of-rights when transmitted by post or otherwise should be securely packed in boxes of suitable size made of wood or block tin, and fastened with lock and key. Ordinarily the record will be kept in the box in which it is forwarded until it is returned by the court which has called for it. The key should be sent separately to the presiding officer of the court, or in the case of the Chief Court to the Registrar, by whom it will be returned to the District Record Office. Boxes for this purpose should be constructed under the orders of the Deputy Commissioner, the cost being charged to the allotment for Revenue Contingencies.

5. Lastly, the utmost care should be exercised by Deputy Commissioners to ensure punctual compliance with the demands of the Courts for records-of-rights for perusal. Although the certified extract supplied to litigants by Revenue officials are of much service to the courts, the Financial Commissioner recognises that for the proper disposal of land cases it is occasionally necessary that the courts should be able to consult the original records, and in such cases no delay should be allowed to occur in furnishing them.

CIRCULAR MEMO. No. 11—2962 G. of 1892.

To

ALL DIVISIONAL AND DISTRICT JUDGES, AND DEPUTY COMMISSIONERS
IN THE PUNJAB.

Dated 11th July 1892.

IN modification of the instructions laid down in the concluding portion of paragraph 3 of the Court's Book Circular XX of 1890, Disposal of land suits by District Revenue Assistants. regarding the disposal of land suits by District Revenue Assistants, the Judges are pleased to direct that action on these instructions shall be subject to the sanction of the Commissioner of the Division in each case. No civil suits should be made over to Revenue Assistants without the sanction of the Commissioner, previously obtained through the Deputy Commissioner.

CIRCULAR MEMO. No. 12—3048 G. of 1892.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 18th July 1892.

THE following revised form of Civil Judicial Register No. XV is circulated

SUBJECT.

with a request that it may be substituted for form

No. XV published at page 594 of the Volume of

Judicial Circulars, 3rd Edition.

Revised form of Civil
Judicial Register No. XV.

2. It will be observed that Columns 11 to 15 have been abolished, and a column substituted showing amount of stamps in the file, which will include all stamps in the file, institution stamp, process fees, stamps on other applications, &c.

No. XV.—Record-keeper's Register of original suits and appeals disposed of.

1	2	3	4	5	6	7	8	9	10	11	12	13
Serial number.	Date of receipt in record-room.	Particulars of suit decided.					In favour of which party.	Date and abstract of final order.	Name of deciding officer.	Amount of stamps in the file.	Number of papers in case.	Remarks, (stating where the file has been placed by the Record- keeper).
		Number.	Date of institution.	Names of parties.	Value or amount of claim.	Class of suit according to classification given in Annual Civil Statement No. VIII.						

CIRCULAR MEMO. No. 13—3134 G.

To

ALL SESSIONS JUDGES AND DISTRICT MAGISTRATES
IN THE PUNJAB.*Dated 20th July 1892.*

The Judges have recently noticed that, in many Sessions cases, the Police Diaries have been translated, and the translations and diaries left with the files of the cases, thus laying them open to inspection by the accused or their agents, contrary to the provisions of section 172 of the Criminal Procedure Code. To put a stop to this irregularity, the Judges are pleased to direct, in continuation of the instructions contained in Judicial Circular XLVI of the volume of Judicial Circulars, 3rd Edition, that, before submitting the files in Criminal cases to this Court, the Police Diaries and English translations or notes of them, if any, shall be separated from the files and put into a sealed cover, which should then be placed with the files.

SUBJECT.

Placing of Police Diaries and other translations in sealed covers.

The 28th July 1892.

ADDENDA ET CORRIGENDA TO CHIEF COURT CIRCULARS.

No. 3369 G.—Add the following to List A, Part III, of Book Circular No. XII.—3109 G., dated the 8th July 1890 :—

“Outlines of Medical Jurisprudence for India,” by Gribble and Hehir.

Add the following to List A, Part IV, of Book Circular No. XII—3109 G., dated the 8th July 1890 :—

“A compilation of orders on the subject, of the personal conduct of public officers in their relations to Government,” by Bose and Pudumjee.

The 10th August 1892.

ADDENDA ET CORRIGENDA TO PUNJAB CHIEF COURT CIRCULARS.

No. 3476 G.—Add the following clause to paragraph 7 of Public Works Department Circular No. 19, dated the 27th July 1874, published with Chief Court Book Circular No. IV—2605 G., dated the 2nd June 1890 :—

“If on the preparation of a detailed estimate for a Provincial Civil Public Work it is found that the expenditure will exceed by more than Rs. 15 per cent. the amount for which administrative sanction has been obtained, the Local Public Works Officer must apply through the usual channel to the Head of the Department concerned to obtain fresh administrative sanction in the Civil Department to the enhanced cost.”

The 12th August 1892.

ADDENDA ET CORRIGENDA TO PUNJAB CHIEF COURT CIRCULARS.

No. 3513 G.—Add the following to the last line of List C. (Indian Law Reports) annexed to Chief Court Book Circular No. XII—3109 G., dated the 8th July 1890 :—

“Kulu, Murree, Rajanpur, Sirsa and Mardan.”

The 1st September 1892.

No. 3823 G.—*Notification.*—The following list of days to be observed as holidays in the Chief Court and the Civil Courts subordinate thereto during the year 1893 has been prepared by the Chief Court and approved by the Local Government, as required by Section 67, clause (1), of the Punjab Courts Act, 1884, and is published for general information.

List of General Holidays to be observed by the Chief Court and all Civil Courts in the Punjab subordinate thereto during the year 1893.

Description of holidays.	Names of holidays.	Date on which they fall.	Day or days of the week.	No. of days excluding Sundays.
General ...	Proclamation Day...	2nd January ...	Monday ...	1
Hindu ...	Lohri ...	11th January ...	Wednesday ...	1
Do. ...	Basant Panchmi ...	22nd January ...	Sunday ...	...
Do. ...	Sheoratri ...	15th February ...	Wednesday ...	1
Christian ...	Ash Wednesday ...	22nd February ...	Wednesday ...	1
Hindu ...	Holi ...	28th February to 2nd March.	Tuesday to Thursday.	3
Muhammadan ...	Shab-barát ...	4th March ...	Saturday ...	1
Hindu ...	Durga Ashtmi ...	25th March ...	Saturday ...	1
Christian ...	Good Friday ...	7th April ...	Friday ...	1
Hindu ...	Baisákhí ...	11th April ...	Tuesday ...	1
Muhammadan ...	Juma-ul-Wida ...	14th April ...	Friday ...	1
Do. ...	Id-ul-Fitar ...	19th and 20th April	Wednesday and Thursday.	2
Hindu ...	Somawati Amawas	15th May ...	Monday ...	1
General ...	Queen-Empress' Birthday	24th May ...	Wednesday ...	1
Hindu ...	Nirjila Ikádshe ...	26th May ...	Friday ...	1
Muhammadan ...	Id-ul-Zuha ...	25th and 26th June	Sunday and Monday	1
Do. ...	Moharram ...	15th to 24th July ..	Saturday to Monday	8
Hindu ...	Bias Púja ...	28th July ...	Friday ...	1
Do. ...	Solono ...	27th August ...	Sunday ...	...
Do. ...	Janam Ashtmi ...	3rd September ...	Sunday ...	...
Muhammadan ...	Akhri Chár Sham-ba	6th September ...	Wednesday ...	1
Do. ...	Bára Wafát ...	23rd September ...	Saturday ...	1
Hindu ...	Anant Chaudas ...	24th September ...	Sunday ...	...
Do. ...	Somawati Amawas	9th October ...	Monday ...	1
Do. ...	Dasehra ...	17th to 20th October	Tuesday to Friday	4
Do. ...	Diwáli ...	7th and 8th November.	Tuesday and Wednesday.	2
Do. ...	Jam Dutia ...	10th November ...	Friday ...	1
Do. ...	Deo Uthan ...	19th November ...	Sunday ...	...
Do. ...	Tukri Fair ...	23rd November ...	Thursday ...	1
Christian ...	Christmas Day ...	25th December ...	Monday ...	1
General ...	Short Vacation ...	26th to 31st December.	Tuesday to Sunday	5

Every Sunday in the year.

The last Saturday in every month, provided the state of business in the Courts admits.

All Subordinate Civil Courts, Original and Appellate (with the exception of those located at Hill Stations), will be closed during the month of September.

The long vacation of the Chief Court will commence on Tuesday, the 15th August 1893, and terminate on Sunday, the 15th October 1893.

NOTE.—Local holidays have been omitted from this list.

BOOK CIRCULAR No. IV
—G.
3862

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 7th September 1892.

THE attention of the Judges has recently been drawn to a most irregular practice which prevails in some Civil Courts in connection with the transfer of

SUBJECT.

Irregular practice of transferring revenue-paying land of judgment-debtors to decree-holders by mortgage for sums due on money decrees.

revenue-paying land of judgment-debtors to decree-holders by mortgage for amounts due on money decrees.

2. It appears that after the land has been attached in execution of the decree, and when the Collector reports, under Section 326, Civil Procedure Code, to the executing Court, that the decree can be satisfied by a temporary alienation of the land for a period of years, the decree-holder refuses to accept the arrangement or to take the land on the terms proposed by the Collector, but applies for an unlimited mortgage to him of the land or a portion of it for the amount due on the decree. The executing Court accepts the decree-holder's application and orders that the land or a portion of it be transferred to the decree-holder in mortgage until the amount of the decree is paid; and the decree-holder is then put in possession.

3. The Judges desire to point out to executing Courts that neither Section 326 nor any other section of the Civil Procedure Code empowers a Civil Court to make any arrangement affecting the land of a judgment-debtor. Under Section 326, Civil Procedure Code, the utmost the Court is competent to do is to *authorize the Collector* to provide for satisfaction of the decree being made within a reasonable period in the manner recommended by the Collector, that is, by a temporary alienation or management of the land or share of which the public sale is reported to be objectionable.

4. The procedure to be followed upon a representation being made by the Collector has been prescribed in the rules contained in paragraph 48 of Judicial Circular No. XXVII in the Volume of Judicial Circulars, 3rd Edition.

5. If the requisite authority be given by the Court to the Collector, the Court's proceedings are to be regulated by Rules III and IV in paragraph 48; if it is withheld, neither the Court nor the Collector is competent to make any disposition whatever of the land or share of the judgment-debtor in execution of the decree-holder's decree.

6. The Judges desire to impress upon executing Courts the necessity of adhering strictly to the provisions of the Code and of the Circular above quoted in dealing with property to which Section 326, Civil Procedure Code, applies; and to add that serious notice will be taken of any irregular practice of the kind adverted to at the commencement of this Circular which may come to their knowledge.

CIRCULAR MEMO. No. 14—4169 G. OF 1892.

To

ALL DIVISIONAL AND SESSIONS JUDGES, DISTRICT MAGISTRATES,
DISTRICT JUDGES, AND JUDGES OF SMALL CAUSE COURTS
IN THE PUNJAB.

Dated 21st October 1892.

The revised "statement showing the cost of Judicial Registers (Civil, Criminal and Common to both Courts) printed at, and supplied by, the Lahore Central Jail Lithographic Press," annexed hereto, is published for information in supersession of that contained in Circular Memo. No. 1—191 G., dated the 14th January 1892.

APPEN

Statement showing cost of Judicial Registers (Civil, Criminal and Common to both

1	2	3				
		PAPER.				
No. of Register.	Name of Register.	Description of paper.	Size of sheet.	Quantity of paper.	Rate per quire.	Cost of paper.
				Q. S.		Rs. A. P.
	CIVIL REGISTERS.					
I	Register of Civil Suits		Full	4 0		0 12 0
II	" Miscellaneous cases cognizable only by principal Courts of original jurisdiction.		"	2 0		0 6 0
III	" Divorce and Matrimonial cases.		"	2 0		0 6 0
IV	" Cases under the Land Acquisition Act.		"	2 0		0 6 0
V	" Probates, &c.		"	1 0		0 3 0
VI	" Miscellaneous petitions and applications.		Half	1 0		0 3 0
VII	" Applications to sue or appeal as a pauper.		"	0 12		0 1 6
VIII	" Rejected and returned plaints and memoranda of appeal.		"	0 12		0 1 6
IX	" Dates fixed for trial of suits and appeals.		"	3 0		0 9 0
X	" Execution of decrees ...		Full	4 0		0 12 0
XI	" Objections in cases of execution of decrees.		Half	0 12		0 1 6
XII	" Applications for review of judgment.		"	0 12		0 1 6
XIII	" Appeals from decrees ...		Full	2 0		0 6 0
XIV	" Miscellaneous appeals ...		"	2 0		0 6 0
XV	Record-keeper's General Register of Suits and appeals disposed of.		"	6 0		1 2 0
XVI	Register of judgment-debtors confined in execution of decrees.		Half	0 12		0 1 6
XVII	" Persons punished for contempt of Court.		"	0 12		0 1 6
XVIII	" Payment of stamp duties and penalties.		"	0 12		0 1 6
XIX	" Court fees realized daily ...		"	0 12		0 1 6
XX	" Fines imposed on ministerial officers.		"	0 12		0 1 6
XXI	" Peons		Full	2 0		0 6 0
XXII	" Property made over to the custody of Lambardars.		Half	0 12		0 1 6
XXIII	" Process fees and diet money of witnesses.		"	3 0		0 9 0
XXIV	" Witnesses attending civil courts		"	1 0		0 3 0
XXV	" Processes served by each peon		"	1 0		0 3 0
XXVI	" Documents returned ...		"	0 12		0 1 6
XXVII	" Affidavits attested		Full	1 0		0 3 0

DIX A.

Courts) printed at, and supplied by the Lahore Central Jail Lithographic Press.

4					5			6		7		8		9	
PRINTING.								Cost of heading to each Register.		Cost of ruling.		Cost of each Register (Total of columns 3, 5, 6 and 7.)			
Number of forms.	Number of pages.	Total number of pages charged for.	Rate per hundred pages.	Cost of printing.	Binding.									Remarks.	No. of Register.
			Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.			
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150	2	400	0 12 0	3 0 0	0 9 0	0 2 0	2 0 0	3 4 0	"				IX		
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50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	0 2 0	3 6 6	Board				XIII		
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25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	Cloth				XVI		
25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	"				XVII		
25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	"				XVIII		
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	Board				XIX		
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"				XX		
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	0 2 0	3 6 6	"				XXI		
25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	Cloth				XXII		
150	2	400	0 12 0	3 0 0	0 9 0	0 2 0	2 0 0	3 4 0	Board				XXIII		
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"				XXIV		
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"				XXV		
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"				XXVI		
25	2	200	1 8 0	3 0 0	0 8 8	0 2 0	2 0 0	2 13 8	Cloth				XXVII		

APPENDIX

Statement showing cost of Judicial Registers (Civil, Criminal and Common to both

1	2	3				
No. of Register.	Name of Register.	PAPER.				
		Description of paper.	Size of sheet.	Quantity of paper.	Rate per quire.	Cost of paper.
CRIMINAL REGISTERS.						
I A	Register of Cognizable offences instituted on complaint or on the motion of Magistrate.	Bádami Royal.	Full	4 0	0-8-0	0 12 0
I B	" Cognizable offences reported by the Police under sections 157 and 173 of the Criminal Procedure Code		"	4 0		0 12 0
I C	" Non-cognizable offences ...		"	4 0		0 12 0
II	" Cases under the I. Penal Code		"	4 0		0 12 0
III	" Cases under the Special or Local Laws.		"	2 0		0 6 0
IV	" Miscellaneous criminal cases		Half	1 0		0 3 0
V	" Cases decided in each Court		Full	4 0		0 12 0
VI	" Showing the number of offences reported and brought up for trial and of persons discharged.		"	2 0		0 6 0
VII	" Cases tried by District Magistrates under section 30, Criminal Procedure Code.		"	1 0		0 3 0
VIII	" Sessions trials ...		Half	0 12		0 1 6
IX	" Trial of European British subjects (for District Courts)		"	0 12		0 1 6
X	" Trial of European British subjects (for Sessions Courts).		"	0 12		0 1 6
XI	" Complaints against or enquiries into conduct of Government officials.		"	0 12		0 1 6
XII	" Appeals in criminal cases ...		"	1 0		0 3 0
XIII	" Dates fixed for trial of criminal cases.		"	1 0		0 3 0
XIV	" Prisoners under trial ...		"	1 0		0 3 0
XIV A	" Prisoners admitted and removed from the lock-up.		Full	2 0		0 6 0
XV	" Witnesses attending Criminal courts.		Half	1 0		0 3 0
XVI	" Court fees realized daily ...		"	0 12		0 1 6
XVII	" Fines		Full	1 0		0 3 0
XVIII	" Fines realized		Half	0 12		0 1 6
XIX	" Unexpired sentences...		Full	2 0		0 6 0
XX	Record-keeper's General Register ...		"	6 0		1 2 0
COMMON TO BOTH COURTS.						
A	Register of Receipts of deposits ...	"	1 0	0 3 0		
B	" Repayments on account of deposits.	"	1 0	0 3 0		

A—continued.

Courts) printed at, and supplied by, the Lahore Central Jail Lithographic Press.

4					5			6			7			8			9	
PRINTING.					Binding.			Cost of heading to each register.			Cost of ruling.			Cost of each register (Total of columns 3, 5, 6 and 7).			Remarks.	No. of Register.
No. of forms.	No. of pages.	Total number of pages charged for.	Rate per hundred pages.	Cost of printing.														
			Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.				
100	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 12 6	Board	I A							
100	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 12 6	"	I B							
100	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 12 6	"	I C							
100	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 12 6	"	II							
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 6 6	"	III							
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"	"	IV							
100	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 12 6	"	V							
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 6 6	"	VI							
25	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	2 0 0	3 3 6	"	VII							
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	"	VIII							
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	"	IX							
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	"	X							
25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	Cloth	"	XI							
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	Board	"	XII							
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"	"	XIII							
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"	"	XIV							
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 6 6	"	"	XIV A							
50	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 12 3	"	"	XV							
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	"	XVI							
25	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 3 6	"	"	XVII							
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	"	XVIII							
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 6 6	"	"	XIX							
150	2	400	1 8 0	6 0 0	1 0 0	0 2 0	4 0 0	6 4 0	"	"	XX							
25	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 3 6	"	"	A							
25	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 3 6	"	"	B							

APPENDIX

Statement showing cost of Judicial Registers (Civil, Criminal and Common to both

1	2	3				
		PAPER.				
		Description of paper.	Size of sheet.	Quantity of paper.	Rate per quire.	Cost of paper.
No. of Register.	Name of Register.			Q. S.		Ra. A. P.
C	Register of General receipts and deposits	Bádami Royal.	Half	0 12	0-3-0.	0 1 6
D	" Contingent expenditure in Judicial Department.		"	0 12		0 1 6
E	" Files taken from Record Room		"	0 12		0 1 6
F	" Applications for copies (both English and Vernacular).		Full	2 0		0 6 0
F 2	" Copyists (English only) ...		"	2 0		0 6 0
G	" Miscellaneous proceedings received from other Courts		"	1 0		0 3 0
H	" Despatch of packets and letters.		Half	0 12		0 1 6
I	" General Orders issued in Judicial Department.		"	0 12		0 1 6
J	" Property received in Názir's Store-room.		Full	1 0		0 3 0
K	" Government employés ...		"	1 0		0 3 0
L	Character Book ...		"	1 0		0 3 0
M	Register of Petition-writers ...		Half	1 0		0 3 0

NOTE.—Extra copies of headings can be supplied,
Do. do. do.

A—concluded.

Courts) printed at, and supplied by, the Lahore Central Jail Lithographic Press.

4					5	6	7	8	9	
PRINTING.					Binding.	Cost of heading to each Register.	Cost of ruling.	Cost of each Register (Total of columns 3, 5, 6 and 7).	Remarks.	No. of Register.
Number of forms.	Number of pages.	Total number of pages charged for.	Rate per hundred pages.	Cost of printing.						
			Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.		
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	Board	C
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	D
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	"	E
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 6 6	"	F
50	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 6 6	"	F2
25	2	200	1 8 0	3 0 0	0 8 5	0 2 0	2 0 0	2 13 8	Cloth	G
25	2	200	0 12 0	1 8 0	0 4 6	0 2 0	1 0 0	1 8 0	"	H
25	2	200	0 12 0	1 8 0	0 7 3	0 2 0	1 0 0	1 10 9	Board	I
25	2	200	1 8 0	3 0 0	0 14 6	0 2 0	2 0 0	3 3 6	"	J
25	2	200	1 8 0	3 0 0	0 8 8	0 2 0	2 0 0	2 13 8	Cloth	K
25	2	200	1 8 0	3 0 0	0 8 8	0 2 0	2 0 0	2 13 8	"	L
50	2	200	0 12 0	1 8 0	0 7 3	...	...	2 2 3	Board	M

full sheet, at Rs. 4-0-0 per 100 copies.

half sheet, at Rs. 3-0-0 do.

The 11th November 1892.

No. 4518 G.—To be substituted for the Book Circular of the same No. and date.

BOOK CIRCULAR No. IV—3862 G. of 1892.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated the 7th September 1892.

THE attention of the Judges has recently been drawn to a most irregular practice which prevails in some Civil Courts in connection with the transfer of revenue-

SUBJECT.

Irregular practice of transferring revenue-paying land of judgment-debtors to decree-holders by mortgage, for sums due on money decrees.

paying land of judgment-debtors to decree-holders by mortgage for amounts due on money decree.

2. It appears that after the land has been attached in execution of the decree, and when the Collector reports, under Section 326 of the Code of Civil Procedure, to the executing Court, that the decree can be satisfied by a temporary alienation of the land for a period of years, the decree-holder refuses to accept the arrangement or to take the land on the terms proposed by the Collector, but applies for an unlimited mortgage to him of the land or a portion of it for the amount due on the decree. The executing Court accepts the decree-holder's application, and orders that the land or a portion of it be transferred to the decree-holder in mortgage until the amount of the decree is paid; and the decree-holder is then put in possession.

3. The Judges desire to point out to executing Courts that neither Section 326 nor any other section of the Code of Civil Procedure empowers a Civil Court to make any arrangement affecting the land of a judgment-debtor, much less an arrangement by which the land is made over to the decree-holder for an unlimited time without providing that the income shall be applied to the liquidation of the decree. Under Section 326 of the Code the utmost the Court is competent to do is to *authorize the Collector* to provide for satisfaction of the decree being made within a reasonable period in the manner recommended by the Collector.

4. The procedure to be followed upon a representation being made by the Collector has been prescribed in the rules contained in paragraph 48 of Judicial Circular No. XXVII in the Volume of Judicial Circulars, 3rd edition.

5. If the requisite authority be given by the Court to the Collector the Court's proceedings are to be regulated by rules III and IV in paragraph 48; if it is withheld, neither the Court nor the Collector is competent to make any disposition whatever of the land or share of the judgment-debtor in execution of the decree-holder's decree.

6. The Judges desire to impress upon executing Courts the necessity of adhering strictly to the provisions of the Code and of the Circular above quoted in dealing with property to which Section 326 applies; and to add that serious notice will be taken of any irregular practice of the kind adverted to at the commencement of this Circular which may come to their knowledge.

CIRCULAR MEMO. No. 15—4541 G. OF 1892.

To

ALL SESSIONS JUDGES IN THE PUNJAB.

Dated 14th November 1892.

THE Judges of the Chief Court find it is not the practice in some Sessions Courts to place the *Calendar and reasons for commitment*

SUBJECT.

Trial of Sessions cases.

upon the file of the Sessions Court, and that the instructions on the subject contained in paragraphs 18 to 23 of Judicial Circular No. LIV of the Volume of Judicial Circulars, 3rd edition, are not sufficiently clear; the following alterations have accordingly been made in them, and are published for information and guidance.

2. *Substitute the following for the first clause of paragraph 18 :—*

18. "When a commitment is made, the Magistrate should notify the fact, and transmit the following papers to the Court of Session :—

(a) the record of the original inquiry, including the order of commitment made under Section 213 of the Code of Criminal Procedure, and a copy of the original charge made under Section 210 of the said Code ;

(b) the original charge framed under Section 210 of the Code of Criminal Procedure ;

(c) the Calendar, as required by paragraph 13 of this Circular ;

(d) the reasons for commitment, prescribed by Section 213 of the Code of Criminal Procedure, and paragraph 14 of this Circular, whether endorsed on the Calendar or separately recorded."

3. *Add as a new paragraph after paragraph 20 :—*

"20 (a). The papers referred to in paragraph 18, clauses (b), (c) and (d), form the basis of the Sessions file. Of these the charge, either as originally framed by the Magistrate, or as amended in the Sessions Court, must be read out at the commencement of the trial in open Court, but neither the Calendar nor the reasons for commitment need to be, or should be read out."

4. *Substitute the following for paragraph 21 :—*

"21. The papers to be transferred to the Sessions file from the record of inquiry ((a) in paragraph 18) are, briefly, those admitted in evidence by the Sessions Court."

5. *Substitute the following for the first sentence of paragraph 23 :—*

"23. Every paper to be transferred to the Sessions file shall be first read out in full in open Court."

6. *Add the following sentence to paragraph 23 :—*

"On every paper transferred, an endorsement shall be made to the effect that it has been read out and admitted in evidence and transferred to the file of the Sessions Court."

CIRCULAR MEMO. No. 16—4639 G. of 1892.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 22nd November 1892.

SEVERAL instances have occurred in which Civil Courts in the Punjab have

SUBJECT.

Manner in which processes of the Courts are to be served, when the person to be served resides out of British India.

sent vernacular processes to Colonial Courts and Consular authorities for service on persons residing beyond India, and especially to the Superior Courts of the Straits Settlements. This practice is not authorized by the Code of Civil Procedure, and, apart from its irregularity, is found to be inconvenient, as the Courts are often unacquainted with the proper designations and addresses of the Colonial and Consular Officers addressed, and the latter are not in all cases able to have the vernacular processes read.

2. The Code of Civil Procedure (Sections 89 and 90) prescribes the manner in which processes of the Courts in British India are to be served when the person who is to be served resides beyond the limits of British India, and has no Agent in British India, empowered to accept service.

3. When such person resides in a place which is outside British India, but in territory in which there is a British Resident or Agent, or a Superintendent appointed by the British Government, or a Court constituted by the Government of India, the procedure laid down in Section 90 should ordinarily be followed.

4. In all other cases described in paragraph 2 above, Section 89 prescribes the procedure to be followed. It directs that the summons shall be addressed to the person to be served, at the place where he is residing, and forwarded to him by post, if there be postal communication established between such place and the place where the Court is situate. Cases in which postal communication does not exist need not be considered, and can be specially dealt with by the Courts; in the case of Courts subordinate to the District Judge, after consulting the latter.

5. The provisions cited are subject to those contained in Sections 91 and 92 as to persons who hold an exceptional position; and of Sections 93 and 94 as to service of process; and of Section 95 as to postage, but subject to these, the provisions of Section 89 and Section 90 must in future be strictly observed by Civil Courts in the Punjab.

6. When a summons or other process is issued to a territory in which there may be difficulty in having the vernacular document read or translated, it should be accompanied by a translation in English.

GENERAL LETTER No. 4640 G. of 1892.

To

ALL SESSIONS JUDGES IN THE PUNJAB

Dated 22nd November 1892.

THE attention of the Judges has been drawn to the manner in which

SUBJECT.

Magisterial powers exercised by officers in Military Cantonments.

criminal judicial powers are sometimes exercised in Military Cantonments by officers appointed permanently or temporarily to be Cantonment Magistrates. There is reason to apprehend that the provisions of the Code of Criminal Procedure are sometimes ignored by such officers in dealing with accused persons.

Irregularities are found to occur most frequently in connection with the preparation of the record of judicial proceedings held by these officers in their magisterial capacity.

2. The Judges consider it desirable that measures should be taken to prevent the occurrence of such irregularities and to secure that the procedure of Magistrates appointed in Military stations shall conform to the Code of Criminal Procedure.

3. With regard to the powers exercised by such officers in their administrative capacity, the superior courts have no direct concern ; but the proceedings in every case dealt with in a magisterial capacity ought to be conducted and recorded in accordance with the procedure laid down in the Code, whether the case be one of a breach of a Cantonment rule, or of the provisions of the Police Act, or of any other local or special law, or falls under the Indian Penal Code.

4. Three modes of procedure in dealing with persons accused of offences are prescribed in the Code of Criminal Procedure, namely :—

- (1) for the trial of summons cases ;
- (2) " " warrant cases ;
- (3) in summary trials.

The last mentioned mode of procedure can only be adopted where the officer empowered as a Magistrate, is a Magistrate of the 1st class, and has been invested personally with summary powers ; in all other cases the ordinary procedure is to be followed accordingly as the case is a summons case or a warrant case.

5. District Magistrates should be requested to inspect the office of every officer exercising magisterial powers in any Military station within their districts, and to take special note of the practice adopted in preparing the record of magisterial proceedings. All registers maintained by a Cantonment Magistrate in connection with his magisterial duties should be inspected, to ascertain, first, that all registers required to be maintained by the orders of this Court, are maintained, and, secondly, that books or registers not so prescribed are not used for the purpose of recording judicial proceedings. In particular, the form of record adopted for summary trials should be examined in order to ascertain, first, that it answers the requirements of Section 263 of the Code of Criminal Procedure ; second, that it is used only by officers invested with summary powers ; and third, that it is only used for cases which are triable summarily. Where it is found that a practice exists of using unauthorized registers for purposes of record, or that the records of judicial proceedings are not prepared in accordance with the provisions of the Code of Criminal Procedure, the point should be specially noted.

6. The results of the inspection made by District Magistrates should be reported without avoidable delay. When all the reports have been received, the Judges will be in a position to frame a general Circular for the information and guidance of Cantonment Magistrates in exercising their magisterial functions.

7. In the meantime, whenever a Military Officer without judicial experience is appointed to the office of Cantonment Magistrate, the Magistrate of the District should take measures at an early opportunity to advise him generally as to the manner in which his magisterial powers should be exercised, and to especially direct his attention to the prescribed modes of procedure and of record.

— — —
The 29th November 1892.

ADDENDA ET CORRIGENDA.

No. 4738 G.

1. Paragraphs 13 and 16 of Judicial Circular XIV of the Volume of Judicial Circulars, 3rd edition, are cancelled.

2. For paragraphs 14 and 15 of the same Circular substitute the following :—

“14. Postage charges on all processes, notices and other such documents, issued from any Court and transmitted by post, are to be paid by means of service postage stamps, without any additional charge being levied from the parties at whose instance the process or document is issued. In cases in which it is considered necessary to register the cover, the fee for registering it will also be paid by means of service postage stamps.

“15. Processes received for service from Courts in other provinces should be returned in service postage paid covers, the service stamps being provided by the returning Court. Similarly processes returned to Punjab Courts from Courts in other provinces will be sent in service postage paid covers. The same rule of course applies to processes returned by or to other Courts in the same province.

“Service postage labels required for this purpose will be obtained in the usual way.”

— — —
The 30th November 1892.

No. 4753 G.

In Chief Court Notification No. 3823 G., dated the 1st September 1892
or—

“Christian ... Ash Wednesday ... 22nd February ... 1 day”

read

“Christian ... Ash Wednesday ... 15th February ... 1 day”

and for—

“Christian ... Good Friday ... 7th April ... 1 day”

read

“Christian ... Good Friday ... 31st March ... 1 day.”

— — —
CIRCULAR MEMO. No. 18—4832 G. OF 1892.

To

ALL COURTS IN THE PUNJAB.

Dated the 9th December 1892.

THE attention of all Courts is invited to the alterations made in the Court Fees Act and Indian Stamp Act by Acts VIII of 1890 and XII of 1891. A statement of the changes made is appended.

SUBJECT.

Alterations made in the Court Fees Act and Indian Stamp Act by Acts VIII of 1890 and XII of 1891.

2. Section 34 of the Court Fees Act, as now enacted makes the sale of Court Fees stamps by any person other than a licensed vendor, a punishable offence.

3. Attention is also invited to the annexed Circular No. 7, dated the 16th November 1892, issued by the Superintendent of Stamps,

APPENDIX I.

List showing the alterations and amendments made by
Acts VIII of 1890 and XII of 1891 in the Court
Fees and Indian Stamp Acts.

Year.	No.	Subject or Title.	Particulars of alterations and amendments.
1870.	VII	Court Fees Act, 1870	<p><i>By Act VIII of 1890.</i></p> <p>Schedule 19H and Article 10 of Schedule I have been repealed.</p> <p><i>By Act XII of 1891.</i></p> <p>In Section 3 the word "sixteen" has been repealed.</p> <p>In Section 7, paragraph IV, last clause, the following words have been repealed :—"And the provisions of the Code of Civil Procedure, Section 31, shall apply as if for the word "claim" the words "relief sought" were substituted.</p> <p>Section 10, clause iii, has been repealed.</p> <p>Section 19, clause ii, has been repealed.</p> <p>In Section 19 C (inserted by Act XIII of 1875, Section 6), first line, the word "such" has been repealed.</p> <p>In Section 19 G (inserted by Act XIII of 1875, Section 6), the words and figures "after the first day of April 1875, or" have been repealed.</p> <p>Sections 24 and 32 have been repealed.</p> <p>Schedule II, Articles 8 and 9, have been repealed.</p> <p>For Section 34 substitute the following :—</p> <p>34 (1). The Local Government may from time to time make rules for regulating the sale of stamps to be used under this Act, the persons by whom alone such sale is to be conducted and the duties and remuneration of such persons.</p> <p>(2). All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.</p> <p>(3). Any person appointed to sell stamps who disobeys any rule made under this section, and any person not so appointed who sells or offers for sale any stamps, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.</p> <p>In Schedule I, Article 2, for "Act XIV of 1859 (to provide for the limitation of suits). Section 15," read "the Specific Relief Act, 1877, Section 9."</p>

Year.	No.	Subject or Title.	Particulars of alterations and amendments.
1870.	VII	Court Fees Act, 1870	In Schedule II, Article 4, for "Bombay Act No. V of 1864 (to give Mámlatdárs' Courts jurisdiction in certain cases to maintain existing possession or to restore possession to any party dispossessed otherwise than by course of law)," read "the Mámlatdárs' Courts Act, 1876."
1879.	I	Indian Stamp Act, 1879	Section 2, from the commencement down to the word "but" has been repealed. Schedule II, Article 2, clauses (b) and (c), repealed. Schedule II, Article 10, has been repealed. Schedule II, Article 11, clause (b), has been repealed. Schedule III has been repealed. In Schedule I, Article 5, clause (b), for "right" read "rights." In Schedule II, Article 13, clause (b), before "annual" insert "average."

APPENDIX II.

Circular No. 7, issued by the Superintendent of Stamps, Punjab, dated the 16th November 1892.

It has come to notice that in one district the alteration in the law with regard to the sale of Court Fee stamps (including labels) which was effected by Act XII of 1891, and to which special attention was invited in this office Circular No. 3, dated 8th October 1891, has been lost sight of. Under the orders of the Financial Commissioner it is, therefore, requested that all Deputy Commissioners will report whether effect has been given to the instructions contained in the second paragraph of that Circular.

2. Under the law, as it now stands, the sale of a Court Fee stamp or label by any person other than a licensed vendor is an offence punishable under Section 34 of the Act with six months' imprisonment or with fine. The effect of this provision should be to afford almost perfect security against the fraudulent re-use of Court Fee labels, a consideration that makes the matter one of the first importance. This view is fully explained in the annexed extract from a letter to the address of the Junior Secretary to Financial Commissioner.

3. Steps should be taken to insure that the state of the law is thoroughly understood by the subordinate Courts and by the officials in the district Record Room.

Extract (para. 4) from letter No. 31, dated 5th October 1892, from the Superintendent of Stamps, Punjab, to the Junior Secretary to Financial Commissioner, Punjab.

As regards the general questions, arising out of this case, it appears to me clear that whatever may have been the danger of such frauds (and it was undoubtedly great) and so long as these labels could circulate freely from hand to hand that danger ought to have practically ceased when the amending Act was passed in 1891. Every vendor selling an adhesive Court Fee label is required by Rule XI of the rules published in Punjab Government Notification No. 1729, dated 4th July 1885, to enface on it the name of the purchaser, and date of sale. Under the provisions of the law, as it now stands, a label purchased by A and enfaced with his name at the time of purchase can be filed by him only, or at all events it cannot pass through the hands of B, C, D, &c., and be filed by any one of them as it could before. So that if either party in a suit filed a label which is *not* enfaced in his name, the fact ought at once to attract the attention of the responsible official of the Court, and lead to inquiry. Formerly, the circumstance would have been in no way remarkable. I think it will, therefore, be evident that the most ordinary care would now at once lead to the detection of an attempt to re-use a Court Fee label which had been abstracted from another file, or intercepted when handed in as *talabana*. To give such an attempt any chance of success, it would be necessary to alter the name on the stamp, and the danger of such alterations being made appears to me to be very slight.

CIRCULAR MEMO. No. 19—4851 G. OF 1892.

To

ALL SESSIONS JUDGES, DISTRICT MAGISTRATES AND MAGISTRATES

IN THE PUNJAB.

Dated 10th December 1892.

THE annexed statement, showing particulars regarding prisoners confined in a Judicial Lock-up, is to be substituted for Form B attached to Book Circular No. XVIII—3822 G., dated the 5th September 1890, and referred to in Rule VIII of the rules circulated therewith.

FORM B—RULE VIII.

Monthly return showing particulars regarding Prisoners confined in the _____ Lock-up in the _____ District, for the
month of _____ 189 .

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NOTE.—Persons committed for trial should also be included in this statement.
The total of columns 5 to 10, inclusive, should correspond with that of column 3.
Column 6 is intended for A (under-trial prisoners) only.

In charge of Lock-up.

No. 4924 G. of 1892.

To

ALL DISTRICT JUDGES IN THE PUNJAB.

Dated 14th December 1892.

I AM desired to request you to supply information in the accompanying form, in regard to females imprisoned under the orders of Civil Courts, for each of the years 1890, 1891 and 1892.

The information is required for submission to Government and should be supplied before the 31st January 1893.

Number of females imprisoned under the orders of the Civil Courts in the year 189

Name of female.	Whether imprisoned in execution of a decree for custody of wife, or in execution of a money decree or under an order passed before decree.	Period during which she remained in prison. If the same female was imprisoned more than once, the period she was confined on each occasion.	Whether measures were taken to enforce the decree otherwise than by imprisonment before this was ordered. If not, the reason why such measures were not taken.	Any other remarks which may appear necessary to explain the case.

CIRCULAR MEMO. No. 20—4995 G. OF 1892.

To

ALL CRIMINAL COURTS IN THE PUNJAB.

Dated 20th December 1892.

Two points in connection with the preparation of District Criminal Statement No. II have been referred to the Judges for instructions, namely :—

SUBJECT.

Alteration of District Criminal Statement No II.

- (1) how cases are to be shown in which no action has been taken on the complaint in consequence of the failure of the complainant to appear for examination, and on which the final order passed is that the complaint be consigned to the record room ;
- (2) where cases are to find a place in the return (which have been shown in the column of cases returned as true) in which processes have issued, but an order has been made under Section 247 or Section 259 of the Code without the accused having appeared before the Court ; note V of the statement requiring that only cases in which an accused person has appeared before the Court in person or by agent shall be shown in columns 8 to 19 of the statement.

2. In regard to the first class of cases the Judges desire to point out that if the provisions of Sections 200 and 203 of the Code are complied with no difficulty can arise.

Section 200 requires that the Magistrate taking cognizance of a complaint shall *at once* examine the complainant, and he may then proceed to dispose of the case under Section 203, if in his judgment no sufficient ground for proceeding exists.

As the complainant must attend when a complaint is presented, he is always available for examination at that time. The practice in most districts however, is for one of the Magistrates at head-quarters to receive all complaints, and to distribute them, under the orders of the District Magistrate, among the other Magistrates, and some delay occurs before the complainant is called up for examination ; meanwhile the complainant often goes away,—either because he becomes tired of waiting ; or because he decides on reflection, or under the advice of friends, to drop the case ; or because the friends of the accused have adjusted the dispute,—and the Magistrate is unable to take further action.

If complaints are sent without delay by the distributing officer to the Magistrate who has to take cognizance of them, and are promptly taken up by such Magistrate proceed in to call up the complainant and examine him forthwith, the number of cases in which no action can be taken should be extremely small, but such cases as do occur must for statistical purposes be shown in column 4 of the return as “ complaints rejected under Section 203 of the Code of Criminal Procedure, without reference to the Police.” (The column of the return quoted is that of the revised District Statement No. II).

3. With regard to the second class of cases alluded to in the first paragraph, a column has been added to the return, after column 7, showing “ cases disposed of under section 247 or section 259 of the Code of Criminal Procedure in which the accused, though summoned, has not appeared in Court in person or by agent.”

The 20th December 1892.

ADDENDUM.

No. 4997 G.—*After Rule III of the Rules for the supply of copies, published with Book Circular No. III of 1890 which takes the place of Judicial Circular No. CX XVIII of the Volume of Judicial Circulars, 3rd edition, add the following note:—*

"Note.—Applications for copies may be made by persons entitled to receive them under Rule III or by persons authorized by such persons to act on their behalf; the authority need not necessarily consist of a formal power-of-attorney, but the officer authorized under Rule IV to receive and deal with applications for copies must satisfy himself, in such manner as he considers sufficient, that the person applying is either himself entitled to the copy applied for under Rule III, or has in fact been authorized to act for a person so entitled.

CIRCULAR MEMO. No. 22—5064 G.

To

ALL DIVISIONAL JUDGES, DEPUTY COMMISSIONERS AND
DISTRICT JUDGES IN THE PUNJAB.

Dated 24th December 1892.

SUBJECT.

Tahsildars required to dispose of a proper amount of Civil Judicial business.

The Judges have from time to time pointed out that the amount of civil business disposed of by Tahsildars is inadequate in many districts.

2. In paragraph 2 of Book Circular No. XX—4246 G., dated the 24th October 1890, instructions were issued that land suits of the jurisdiction value of Rs. 100 and under should ordinarily be made over to Tahsildars for disposal; and in the annual notes on the civil work done by Tahsildars and Munsifs, it has been repeatedly stated that under ordinary circumstances each Tahsildar may be expected to dispose of not less than 15 cases a month for eleven months of the year. This is a very moderate estimate and in several districts has been reached or exceeded without interfering with the other duties which Tahsildars have to perform.

3. In remarking on Appendix A attached to the Report on the administration of Civil Justice for the year 1891, the Hon'ble the Lieutenant-Governor has instructed the Judges to bring to the notice of Deputy Commissioners and District Judges the necessity for requiring the Tahsildar agency to dispose of a proper share of civil business. His Honour's remarks will be found in the subjoined letter to which the attention of Deputy Commissioners and District Judges is invited.

4. District Judges are requested to make over to Tahsildars (as Munsifs) a sufficient number of civil cases to ensure the disposal of not less than 165 civil cases by each Tahsildar in each year. The cases made over to Tahsildars should consist mainly of land suits not exceeding Rs. 100 in jurisdiction value, or unclassified suits relating to village *alau* or agricultural matters within their jurisdiction. If there are not sufficient cases of these classes to enable Tahsildars to dispose of a fair amount of civil work, other cases should be sent to them. If in any district Tahsildars are not, in the opinion of the Deputy Commissioner, in a position to dispose of an average of 165 civil suits in each year, the District Judge should report the matter for the orders of the Judges.

5. The table published at Appendix A, page (iii), of the Civil Justice Report for 1891, shows the districts in which action should at once be taken in regard to this matter, and should be referred to.

Copy of a letter No. 1192 ^{Home}_{Judicial}, dated the 16th December, 1892, from the Junior Secretary to Government, Punjab, to the Registrar, Chief Court, Punjab.

Appendix A attached to the Civil Justice Report for the year 1891 contains a note by you on the civil work done by Assistant Commissioners, Extra Assistant Commissioners, Tahsildars and Munsifs, and in this note appears the following statement.

"There were 11,075 land suits of Rs. 100 or less in value, and Tahsildars might have dealt with all of them, and allowing 165 civil cases per officer per annum, they should have disposed of 21,285 civil suits of all kinds. The work done by this agency is still 24 per cent. below what it should be." At the conclusion of para. 6 of His Honour's Review of the report it was said that the Lieutenant-Governor would look into the question separately, and having done so, His Honour desires me to make the following remarks.

2. It will be seen from the figures given in Appendix A of the Civil Justice Report, that in some districts the Tahsildars did but very few land cases, or indeed very little civil judicial work at all. For the whole Province the average number of civil suits of all kinds disposed of by each Tahsildar was 125, of which 52 were land cases. From Table II appended to Chief Court Book Circular No. VII—287, dated 23rd January 1895, it will be seen that at the time of the reorganization of the Judicial and Executive Services in 1884 it was estimated that Tahsildars could dispose of a much larger number of civil suits. Probably that estimate erred on the side of expecting too much civil judicial work from Tahsildars, still the figures for some districts given in the last Civil Justice Report show that these officers have been able to dispose of a considerable amount, 186 land suits each in Hoshiarpur, 136 in Sialkot, 111 in Jullundur while in Karnal the average was only, per Tahsildar, in Gurgaon 4, in Kohat 5, &c., &c. In Mooltan and Montgomery the total number of cases disposed of on the average by each Tahsildar was larger, namely 269 and 257, but of these only 15 and 7 respectively were land suits. It therefore appears that Deputy Commissioners and District Judges do not in all cases give sufficient attention to the matter, and the Lieutenant-Governor will be obliged if the Judges will bring the matter to the notice of those officers.

**ACTS OF THE LEGISLATURE,
1892.**

LEGISLATIVE DEPARTMENT.

ACT No. II OF 1892.

(Passed on the 29th January 1892.)

An Act to validate certain marriages solemnized under Part VI of the Indian Christian Marriage Act, 1872.

WHEREAS provision is made in Part VI of the Indian Christian Marriage Act, XV of 1872, for the solemnization of marriages between persons of whom both are Native Christians, but not of marriages between persons of whom one only is a Native Christian;

And whereas persons licensed under Section 9 of the said Act have in divers parts of British India, through ignorance of the law, permitted marriages to be solemnized in their presence under the said Part between persons of whom one is a Native Christian and the other is not a Native Christian;

And whereas it is expedient that such marriages, having been solemnized in good faith, should be validated;

It is hereby enacted as follows:—

Commencement.

1. This Act shall come into force at once.

2. In this Act the expression “Native Christian” has the same meaning as in the Indian Christian Marriage Act, XV of 1872.

Definition.

3. All marriages which have already been solemnized under Part VI of the Indian Christian Marriage Act, XV of 1872, between persons of whom one only was a Native Christian, shall be as good and valid in law as if such marriages had been solemnized between persons of whom both were Native Christians:

Validation of irregular marriages. Provided that nothing in this section shall apply to any marriage which has been judicially declared to be null and void, or to any case where either of the parties has, since the solemnization of such marriage and prior to the commencement of this Act, contracted a valid marriage.

4. Certificates of marriages which are declared by the last foregoing section to be good and valid in law, and register-books, and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the law for the time being in force, in so far as the register-books and extracts relate to such marriages as aforesaid, shall be received as evidence of such marriages as if such marriages had been solemnized between persons of whom both were Native Christians.

5. References in this Act to the Indian Christian Marriage Act, XV of 1872, shall, so far as may be requisite, be construed as applying also to the corresponding portions of the Indian Marriage Act, V of 1865.

Application of Act to marriages under Act V of 1865.

6. If any person licensed under Section 9 of the said Act to grant certificates of marriage between Native Christians shall at any time after the commencement of this Act solemnize or effect to solemnize any marriage under Part VI of the said Act or grant any such certificate as therein mentioned, knowing that one of the parties to such marriage or affected marriage was at the date of such solemnization not a Christian, he shall be liable to have his license cancelled and in addition thereto he shall be deemed to have been guilty of an offence prohibited by Section 73 of the said Act, and shall be punishable accordingly.

Simla, the 29th April 1892.

No. 9. The following Statute is published for general information :

ARMY (ANNUAL) ACT, 1892.

[55 VICTORIA, CHAPTER 2.]

An Act to provide during twelve months for the Discipline and Regulation of the Army.

[29th March 1892.]

WHEREAS the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law :

And whereas it is adjudged necessary by Her Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of Her Majesty's Crown, and that the whole number of such forces should consist of one hundred and fifty-four thousand and seventy-three men, including those to be employed at the depôts in the United Kingdom of Great Britain, and Ireland for the training of recruits for service at home and abroad, but exclusive of the numbers actually serving within Her Majesty's Indian possessions :

And whereas it is also judged necessary for the safety of the United Kingdom and the defence of the possessions of this realm that a body of Royal Marine forces should be employed in Her Majesty's fleet and naval service under the direction of the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral aforesaid :

And whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the Government of Her Majesty's forces by sea :

And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm ; yet nevertheless it being requisite for the retaining all the before-mentioned forces, and other persons subject to military law, in their duty, that an exact discipline be observed, and that persons belonging to the said forces who mutiny or stir up sedition, or desert Her Majesty's Service, or are guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow.

And whereas the Army Act will expire in the
44 & 45 Vict., c. 58. year one thousand eight hundred and ninety-two on the following days :—

- (a) In the United Kingdom, the Channel Islands, and the Isle of Man, on the thirtieth day of April ; and
- (b) Elsewhere in Europe, inclusive of Malta, also in the West Indies and America, on the thirty-first day of July ; and
- (c) Elsewhere, whether within or without Her Majesty's dominions, on the thirty-first day of December ;

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lord Spiritual and Temporal and Commons

in this present Parliament assembled, and by the authority of the same as follows:—

Short title.

1. This Act may be cited as the Army (Annual) Act 1892.

Army Act (44 & 45 Vict., c. 58) to be in force for specified times.

2. The Army Act shall be and remain in force during the periods hereinafter mentioned, and no longer, unless otherwise provided by Parliament; that is to say—

- (a) Within the United Kingdom, the Channel Islands, and the Isle of Man, from the thirtieth day of April one thousand eight hundred and ninety-two to the thirtieth day of April one thousand eight hundred and ninety-three, both inclusive; and
- (b) Elsewhere in Europe, inclusive of Malta, also in the West Indies and America, from the thirty-first of July one thousand eight hundred and ninety-two to the thirty-first day of July one thousand eight hundred and ninety-three, both inclusive; and
- (c) Elsewhere, whether within or without Her Majesty's dominions from the thirty-first day of December one thousand eight hundred and ninety-two to the thirty-first day of December one thousand eight hundred and ninety-three, both inclusive:

and the day from which the Army Act is continued in any place by this Act is in relation to that place referred to in this Act as the commencement of this Act.

(2). The Army Act, while in force, shall apply to persons subject to military law, whether within or without Her Majesty's dominions.

(3). A person subject to military law shall not be exempted from the provisions of the Army Act by reason only that the number of the forces for the time being in the service of Her Majesty, exclusive of the marine forces, is either greater or less than the number hereinbefore mentioned.

3. There shall be paid to the keeper of a victualling house for the accommodation provided by him in pursuance of the Army Act the prices specified in the schedule to this Act.

Prices in respect of billeting.

Amendment of Army Act.

Amendment of 44 & 44 Vict., c. 58 s. 44, as to term of penal servitude.

and it is expedient to amend

54 & 55 Vict., c. 69.

4. Whereas by section forty-four of the Army Act the punishment of penal servitude when inflicted is required to be for a term not less than five years, amend that section so as to bring it into conformity with the provisions of the Penal Servitude Act, 1891; be it therefore enacted that—

In the said section forty-four for the word "five" in each place where it occurs shall be substituted the word "three."

5. Whereas by section eighty of the Army Act the notice to be given to a person offering to enlist is required to direct that person to appear before a justice of the peace at the time and place therein mentioned, and it is expedient to amend this enactment; be it therefore enacted that—

Amendment of 44 & 45 Vict., c. 58, s. 80, as to mode of enlistment and attestation.

that—

(1) In sub-section one of the said section eighty, after the words "justice of the peace" shall be inserted the words "either forthwith or."

(2) In sub-section two of the same section, after the words "the justice shall ask him" shall be inserted the words "whether he has been served with and understands the notice and."

6. Whereas by Part I of the Second Schedule to the Army Act, the keeper of a victualling house on whom any soldier is billeted must, if required by the soldier, furnish him with one hot meal on each of the days mentioned in that behalf in the said Part, and it is expedient that any such keeper should, if so required by the soldier, furnish him with a breakfast also; be it therefore enacted that—

To the paragraph number (2) in Part 1 of the Second Schedule to the Army Act, after the word "pepper" shall be added "and with a breakfast consisting of half a pound of bread and a cup of tea."

SCHEDULE.

Accommodation to be provided.	Maximum price..
Lodging and attendance for soldier where hot meal furnished.	Fourpence per night.
Hot meal as specified in Part I of the Second Schedule to the Army Act.	Oneshilling and threepence halfpenny each.
Breakfast as so specified 	On penny halfpenny each.
Where no hot meal furnished, lodging and attendance, and candles, vinegar, salt, and the use of fire, and the necessary utensils for dressing and eating his meat.	Fourpence per day.
Ten pounds of oats, twelve pounds of hay, and eight pounds of straw per day for each horse.	One shilling and ninepence per day.
Lodging and attendance for officer 	Two shillings per night.

Note.—An officer shall pay for his food.

LEGISLATIVE DEPARTMENT.

Simla, the 8th July 1892.

No. 15.—The following Statute and Order in Council are published for general information:—

THE MEDICAL ACT, 1886.

[49 & 50 VICTORIA, CHAPTER 48.]

An Act to amend the Medical Acts.

[25th June 1886.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Medical Act, 1886, and shall be construed as one with the Medical Acts.

PART I.

ADMISSION TO MEDICAL PRACTICE AND CONSTITUTION OF GENERAL COUNCIL.

Qualifying Examinations.

2. On and after the appointed day a person shall not be registered under the Medical Acts in respect of any qualification referred to in any of those Acts unless he has passed such qualifying examination in medicine, surgery and midwifery as is in this Act mentioned.

3. (1). A qualifying examination shall be an examination in medicine, surgery and midwifery held, for the purpose of granting a diploma or diplomas conferring the right of registration under the Medical Acts, by any of the following bodies, that is to say,—

- (a) any university in the United Kingdom or any medical corporation legally qualified at the passing of this Act to grant such diploma or diplomas in respect of medicine and surgery; or
- (b) any combination of two or more medical corporations in the same part of the United Kingdom who may agree to hold a joint examination in medicine, surgery and midwifery, and of whom one at least is capable of granting such diploma as aforesaid in respect of medicine, and one at least is capable of granting such diploma in respect of surgery; or
- (c) any combination of any such university as aforesaid with any other such university or universities, or of any such university or universities with a medical corporation or corporations, the bodies forming such combination being in the same part of the United Kingdom.

(2). The standard of proficiency required from candidates at the said qualifying examinations shall be such as sufficiently to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery and midwifery; and it shall be the duty of the General Council to secure the maintenance of such standard of proficiency as aforesaid; and for that purpose such number of inspectors as may be determined by the General Council shall be appointed by the General Council, and shall attend, as the General Council may direct, at all or any of the qualifying examinations held by any of the bodies aforesaid.

(3). Inspectors of examinations appointed under this section shall not interfere with the conduct of any examination, but it shall be their duty to report to the General Council their opinion as to the sufficiency or insufficiency of every examination which they attend and any other matters in relation to such examination which the General Council may require them to report; and the General Council shall forward a copy of every such report to the body or to each of the bodies which held the examination in respect of which the said report was made, and shall also forward a copy of such report, together with any observations thereon made by the said body or bodies, to the Privy Council.

(4). An inspector of examinations appointed under this section shall receive such remuneration, to be paid as part of the expenses of the General Council, as the General Council, with the sanction of the Privy Council, may determine.

4. (1). If at any time it appears to the General Council that the standard of proficiency in medicine, surgery and midwifery, or in any of those subjects or any branch thereof, required from candidates at the qualifying examinations held by any of the bodies for the time being holding such examinations, is insufficient, the General Council shall make a representation to that effect to the Privy Council, and the Privy Council, if they think fit, after considering such representation, and also any objections thereto made by any body or bodies to which such representation relates, may by order declare that the examinations of any such body or bodies shall not be deemed to be qualifying examinations for the purpose of registration under the Medical Acts; and Her Majesty, with the advice of Her Privy Council, if upon further representation from the General Council or from any body or bodies to which such order relates it seems to Her expedient so to do shall have power at any time to revoke any such order.

(2). During the continuance of any such order the examinations held by the body or bodies to which it relates shall not be deemed qualifying examinations under this Act, and any diploma granted to persons on passing such examinations shall not entitle such persons to be registered under the Medical Acts, and any such body shall not choose either separately or collectively with any other body a member of the General Council, and the member (if any) for the time being representing such body in the General Council shall, unless he was chosen by such body collectively with any other body not subject to an order under this section, be suspended from taking part in the proceedings of the General Council.

5. (1). If a medical corporation represents to the General Council that it is unable to enter into such combination as is in this Act mentioned for the purpose of holding qualifying examinations, and the General Council are satisfied that the said medical corporation has used its best endeavours to enter into such combination as aforesaid, and is unable to do so on reasonable terms, it shall be lawful for the General Council from time to time, if they think fit, on the application of such corporation to appoint any number of examiners to assist at the examinations which are held by such corporation for the purpose of granting any diploma or diplomas conferring on the holders thereof, if they have passed a qualifying examination, the right of registration under the Medical Acts.

(2). It shall be the duty of the said assistant examiners to secure at the said examinations the maintenance of such standard of proficiency in medicine, surgery and midwifery as is required under the foregoing provisions of this Act from candidates at qualifying examinations, and for that purpose the said assistant examiners shall have such powers and perform such duties in the conduct of those examinations as the General Council may, from time to time, by order prescribe.

and any examination held subject to the provisions of this section shall be deemed to be a qualifying examination within the meaning of this Act.

(3). Assistant examiners appointed under this section shall receive such remuneration, to be paid by the medical corporation at whose examinations they take part, as the General Council determine.

(4). A medical corporation shall have power to admit to its examinations assistant examiners appointed under this section, and to conduct its examinations in accordance with the requirements of this section and of any orders made thereunder, anything in any Act or charter relating to such corporation to the contrary notwithstanding.

Effect of Registration.

6. On and after the appointed day a registered medical practitioner shall, save as in this Act mentioned, be entitled to practise medicine, surgery and midwifery in the United Kingdom and (subject to any local law) in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by bye-law from recovering at law their expenses, charges or fees, in which case such prohibitory bye-law, so long as it is in force, may be pleaded in bar of any legal proceeding instituted by such fellow for the recovery of expenses, charges or fees.

Constitution of General Council.

7. (1). After the passing of this Act the General Council shall consist of the following members, that is to say,—

Five persons nominated from time to time by Her Majesty, with the advice of Her Privy Council, three of whom shall be nominated for England, one for Scotland, and one for Ireland :

One person chosen from time to time by each of the following bodies :

- The Royal College of Physicians of London ;
- The Royal College of Surgeons of England ;
- The Apothecaries Society of London ;
- The University of Oxford ;
- The University of Cambridge ;
- The University of London ;
- The University of Durham ;
- The Victoria University, Manchester ;
- The Royal College of Physicians of Edinburgh ;
- The Royal College of Surgeons of Edinburgh ;
- The Faculty of Physicians and Surgeons of Glasgow ;
- The University of Edinburgh ;
- The University of Glasgow ;
- The University of Aberdeen ;
- The University of St. Andrews ;
- The King's and Queen's College of Physicians in Ireland ;
- The Royal College of Surgeons in Ireland ;
- The Apothecaries Hall of Ireland ;
- The University of Dublin ;
- The Royal University of Ireland.

Three persons elected from time to time by the registered medical practitioners resident in England :

One person elected from time to time by the registered medical practitioners resident in Scotland :

One person elected from time to time by the registered medical practitioners resident in Ireland.

(2). The provisions of this section relating to the representation of the Universities of Edinburgh and Aberdeen shall take effect on the occurrence of the first vacancy in the office of the person representing those Universities at the time of the passing of this Act, and the provisions of this section relating to the representation of the Universities of Glasgow and St. Andrews shall take effect on the occurrence of the first vacancy in the office of the person representing such last-mentioned Universities at the time of the passing of this Act; but nothing in this section shall affect the duration of the term of office of any person who at the time of the passing of this Act is a member of the General Council.

8. (1). The members of the General Council representing the registered medical practitioners resident in the several parts of the United Kingdom (in this section referred to as "direct representatives") shall themselves be registered medical practitioners; they shall be elected to hold office for the term of five years, and shall be capable of re-election, and any of them may at any time resign his office by letter addressed to the president of the General Council, and upon the death or resignation of any one of them some other person shall be elected in his place; but the proceedings of the General Council shall not be questioned on account of a vacancy or vacancies among the direct representatives.

(2). Each direct representative shall be a member of the branch council for the part of the United Kingdom in which he is elected; he shall also be entitled to fees for attendance and travelling expenses to the same extent as other members of the General Council are entitled to the same.

(3). The president of the General Council, or any other person whom the General Council may from time to time appoint, shall be the returning officer for the purpose of elections of direct representatives, and such returning officer shall, some time not less than six weeks nor more than two months before the day on which the term of office of any such representative will expire, and as soon as conveniently may be after the occurrence of any vacancy arising from the death or resignation of any such representative, issue his precept to the branch council for that part of the United Kingdom in which such representative was elected, requiring the said branch council to cause a representative to be elected by the registered medical practitioners resident in that part of the United Kingdom within twenty-one days after the receipt of the precept of the returning officer.

(4). The election shall be conducted in such manner as may be provided by regulations to be made by the Privy Council, provided as follows :

- (a) the nomination shall be in writing, and the nomination paper of each candidate shall be signed by not fewer than twelve registered medical practitioners; and
- (b) the election shall be conducted by voting papers, and it shall be the duty of the branch council, in any part of the United Kingdom in which an election is to be held, to cause a voting paper to be forwarded by post to each registered medical practitioner resident in that part at his registered address, but the election shall not be rendered void by reason of the omission of the branch council to cause such voting paper to be forwarded in any particular case or cases, and any registered medical practitioner to whom a voting paper has not been sent in pursuance of this Act may on application to the registrar of the said branch council obtain one from him ; and

(c) any registered medical practitioner entitled to vote at such election may vote for as many candidates as there are representatives to be elected.

(5). Each branch council shall certify to the returning officer the person or persons elected by the registered medical practitioners resident in the part of the United Kingdom to which such branch council belongs.

(6). A direct representative elected in place of any such representative retiring on the expiration of the period for which he was elected shall come into office at the expiration of that period, and a direct representative elected to fill a vacancy caused by the death or resignation of any such representative shall come into office on the day on which he is certified by the branch council to the returning officer to have been elected.

(7). The expenses attending the election of a direct representative shall be defrayed as part of the expenses of the branch council for that part of the United Kingdom in which such representative is elected.

(8). For the purpose of the first election of direct representatives the returning officer shall, in the course of such period of seven days (ending not later than the fifteenth day of November next succeeding the passing of this Act) as the Privy Council may appoint, issue his precept to the branch council in each part of the United Kingdom, requiring such branch council to cause the proper number of representatives to be elected in the part of the United Kingdom to which such branch council belongs within twenty-one days after the receipt of the said precept; and the said representatives shall come into office on the first day of January one thousand eight hundred and eighty-seven.

9. The General Council from time to time, on the occurrence of a vacancy in the office of president of the General Council, shall elect one of their number to be president for a term not exceeding five years, and not extending beyond the expiration of the term for which he has been made a member of the said Council, but nothing in this Act shall affect the duration of the term of office of the person who at the time of the passing of this Act is president of the General Council.

10. (1). The General Council may at any time represent to the Privy Council all or any of the following matters :

- (a) that it is expedient to confer on any university or other body in the United Kingdom capable of granting a medical diploma, not being one of the constituent bodies for the time being of the General Council, and being, in the opinion of the General Council, of sufficient importance to be worthy of such a privilege, the power of returning a member to the General Council, either separately or collectively, with any other body or bodies in the same part of the United Kingdom capable of granting a medical diploma ;
- (b) that it is expedient to confer on any constituent body for the time being returning a member to the General Council collectively with any other body or bodies, and being, in the opinion of the General Council, of sufficient importance to be worthy of such a privilege, the power of returning a member to such Council separately ;
- (c) that it is expedient to confer on the registered medical practitioners resident in any part of the United Kingdom the power of returning an additional member to the General Council ;
- (d) that it is expedient that any constituent body having, in the opinion of the General Council, so diminished in importance as not to be entitled to such privilege, should either be wholly deprived of the power of returning a member to the General Council, or be deprived

of the power of returning a member separately, and permitted to return a member collectively with some other body or bodies.

(2). The Privy Council, before considering such representation, shall cause the same to be laid before both Houses of Parliament.

(3). If either House of Parliament, within forty days (exclusive of any period of adjournment for more than one week) next after any such representation has been laid before such House, present an address to Her Majesty declaring that such representation or any part thereof ought not to be carried into effect, no further proceedings shall be taken in respect of the representation in regard to which such address has been presented; but if no such address is presented by either House of Parliament within such forty days as aforesaid, the Privy Council may, if they think fit, report to Her Majesty that it is expedient to give effect to such representation, and it shall be lawful for Her Majesty by Order in Council to give effect to the same, and any Order in Council so made shall be of the same validity as if it had been enacted in this Act.

PART II.

COLONIAL AND FOREIGN PRACTITIONERS.

11. On and after the prescribed day where a person shows to the satisfaction of the Registrar of the General Council that he holds some recognised colonial medical diploma or diplomas (as hereinafter defined) granted to him in a British possession to which this Act applies, and that he is of good character, and that he is by law entitled to practise medicine, surgery and midwifery in such British possession, he shall, on application to the said Registrar, and on payment of such fee not exceeding five pounds as the General Council may from time to time determine, be entitled, without examination in the United Kingdom, to be registered as a colonial practitioner in the medical register:

Provided that he proves to the satisfaction of the Registrar any of the following circumstances:

- (1) that the said diploma or diplomas was or were granted to him at a time when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during the whole of which he resided out of the United Kingdom; or
- (2) that he was practising medicine or surgery, or a branch of medicine or surgery, in the United Kingdom on the said prescribed day, and that he has continuously practised the same either in the United Kingdom or elsewhere for a period of not less than ten years immediately preceding the said prescribed day.

12. On and after the said prescribed day where a person shows to the satisfaction of the Registrar of the General Council that he holds some recognised foreign medical diploma or diplomas (as hereinafter defined) granted in a foreign country to which this Act applies, and that he is of good character, and that he is by law entitled to practise medicine, surgery and midwifery in such foreign country, he shall, on application to the said Registrar, and on payment of such fee not exceeding five pounds as the General Council may from time to time determine, be entitled, without examination in the United Kingdom, to be registered as a foreign practitioner in the medical register:

Provided that he proves to the satisfaction of the Registrar any of the following circumstances:

- (1) that he is not a British subject; or

- (2) that, being a British subject, the said diploma or diplomas was or were granted to him at a time when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during the whole of which he resided out of the United Kingdom; or
- (3) that, being a British subject, he was practising medicine or surgery, or a branch of medicine or surgery, in the United Kingdom on the said prescribed day, and that he has continuously practised the same in the United Kingdom or elsewhere for a period of not less than ten years immediately preceding the said prescribed day.

13. (1). The medical diploma or diplomas granted in a British possession or foreign country to which this Act applies, which is or are to be deemed such recognised colonial or foreign medical diploma or diplomas as is or are required for the purposes of this Act, shall be such medical diploma or diplomas as may be recognized for the time being by the General Council as furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery and midwifery.

(2). Where the General Council have refused to recognize as aforesaid any colonial or foreign medical diploma, the Privy Council, on application being made to them, may, if they think fit, after considering such application, and after communication with the General Council, order the General Council to recognise the said diploma, and such order shall be duly obeyed.

(3). If a person is refused registration as a colonial or foreign practitioner on any other ground than that the medical diploma or diplomas held by such person is or are not such recognised medical diploma or diplomas as above defined, the Registrar of the General Council shall, if required, state in writing the reason for such refusal, and the person so refused registration may appeal to the Privy Council, and the Privy Council, after communication with the General Council, may dismiss the appeal or may order the General Council to enter the name of the appellant on the register.

(4). A person may, if so entitled under this Act, be registered both as a colonial and a foreign practitioner.

14. The medical register shall contain a separate list of the names and addresses of the colonial practitioners, and also a separate list of the names and addresses of the foreign practitioners registered under this Act; each list shall be made out alphabetically according to the surnames; and the provisions of the Medical Act, 1858, relating to persons registered under that Act, and relating to the medical register and to offences in respect thereof, shall, so far as may be, apply, in the case of colonial and foreign practitioners, registered under this Act and of the said list of those practitioners, in the same way as such provisions apply in the case of persons registered under the said Medical Act, 1858, and of the register as kept under that Act.

15. On and after the appointed day it shall be lawful for any registered medical practitioner who, being on the list of colonial or of foreign practitioners, is on that day in possession of or thereafter obtains any recognised colonial or foreign medical diploma granted in British possession or foreign country to which this Act applies to cause in description of such diploma to be added to his name in the medical register.

16. On an after the appointed day it shall be lawful for any registered medical practitioner who, being on the medical register by virtue of English, Scotch, or Irish qualifications, is in possession of a foreign degree in medicine, to cause a description of such foreign medical degree to be added to his name as an additional title in the medical register, provided he shall satisfy the General Council that he obtained such degree after proper examination and prior to the passing of this Act.

17. (1). Her Majesty may from time to time by Order in Council declare that this part of this Act shall be deemed on and after a day to be named in such Order to apply to any British possession or foreign country which in the opinion of Her Majesty affords to the registered medical practitioners of the United Kingdom such privileges of practising in the said British possession or foreign country as to Her Majesty may seem just; and from and after the day named in such Order in Council such British possession or foreign country shall be deemed to be a British possession or foreign country to which this Act applies within the meaning of this part thereof; but until such Order in Council has been made in respect of any British possession or foreign country, this part of this Act shall not be deemed to apply to any such possession or country; and the expression "the prescribed day" as used in this part of this Act means, as respects any British possession or foreign country, the day on and after which this part of this Act is declared by Order in Council to apply to such British possession or foreign country.

(2). Her Majesty may from time to time by Order in Council revoke and renew any Order made in pursuance of this section; and on the revocation of such Order as respects any British possession or foreign country, such possession or foreign country shall cease to be a possession or country to which this part of this Act applies, without prejudice nevertheless to the right of any persons whose names have been already entered on the register.

18. Nothing in the Medical Act, 1858, shall prevent a person holding a medical diploma entitling him to practise medicine or surgery in a British possession to which this Act applies from holding an appointment as a medical officer in any vessel registered in that possession.

Amendment of 21 & 22
Vict., c. 90, s. 36, as to
medical officers in ships.

PART III.

MISCELLANEOUS PROVISIONS.

19. If at any time it appears to the Privy Council that the General Council has failed to secure the maintenance of a sufficient standard of proficiency at any qualifying examinations, or that occasion has arisen for the General Council to appoint assistant examiners under this Act for the purpose of examinations held by any medical corporation, or to exercise any power or perform any duty or do any act or thing vested in or imposed on or authorized to be done by the General Council under the Medical Acts or this Act, the Privy Council may notify their opinion to the General Council; and if the General Council fail to comply with any directions of the Privy Council relating to such notification, the Privy Council may themselves give effect to such directions, and for that purpose may exercise any power or do any act or thing vested in or authorized to be done by the General Council, and may of their own motion do any act or thing which, under the Medical Acts or this Act, they are authorized to do in pursuance of a representation or suggestion from the General Council.

Default of General
Council.

20. The diploma of member of the King's and Queen's College of Physicians in Ireland and the degree of Master in Obstetrics to any university in the United Kingdom, shall be deemed to be added to the qualifications described in Schedule A to the Medical Act, 1858.

21. Every registered medical practitioner to whom a diploma for proficiency in sanitary science, public health or state medicine has after special examination been granted by any college or faculty of physicians or surgeons or university in the United Kingdom, or by any such bodies acting in combination, shall, if such diploma appears to the Privy Council or to the General Council to deserve recognition in the medical register, be entitled, on payment of such fee as the General Council may appoint, to have such diploma entered in the said register, in addition to any other diploma or diplomas in respect of which he is registered.

22. (1). All powers vested in the Privy Council by the Medical Acts or this Act may be exercised by any two or more of the Lords and others of Her Majesty's most honourable Privy Council.

(2). Any Act of the Privy Council under the Medical Acts or this Act shall be sufficiently signified by an instrument signed by the Clerk of the Council and every order and act signified by an instrument purporting to be signed by the Clerk of the Council shall be deemed to have been duly made and done by the Privy Council, and every instrument so signed shall be received in evidence in all courts and proceedings without proof of the authority or signature of the Clerk of the Council, or other proof.

23. The following copies of any orders made in pursuance of the Medical Acts or this Act, or the Dentists Act, 1878, shall be evidence; that is to say,—

- (1) Any copy purporting to be printed by the Queen's printer, or by any other printer in pursuance of an authority given by the General Council.
- (2) Any copy of an order certified to be a true copy by the registrar of the General Council, or by any other person appointed by the General Council either in addition to, or in exclusion of, the registrar to certify such orders.

Saving Clauses.

24. This Act shall not increase or diminish the privileges in respect of his practice of any person who, on the day preceding the appointed day, is a registered medical practitioner, and such person shall be entitled, on and after the said appointed day, to practise, in pursuance of the qualification possessed by him before the said appointed day, in medicine, surgery and midwifery, or any of them, or any branch of medicine or surgery, according as he was entitled to practise the same before the said appointed day, but not further or otherwise.

25. Any person who at the time of the repeal of any enactment repealed by this Act was, in pursuance of such enactment, legally entitled to practise as a medical practitioner in any colony or part of Her Majesty's dominions other than the United Kingdom, shall after the date of such repeal continue to be so entitled if he would have been entitled if no such repeal had taken place.

Dentists.

26. It is hereby declared that the words "title, addition or description," where used in the Dentists Act, 1878, include any title, addition to a name, designation or description, whether expressed in words or by letters, or partly in one way and partly in the other.

Provisions as to 41 and 42
 Vict., c. 38.

There shall be repealed so much of Section 4 of the Dentists Act, 1878, as provides that a prosecution for any of the offences above in that Act mentioned shall not be instituted by a private person, except with the consent of the General Council or of a branch council, and a prosecution for any such offence may be instituted by a private person accordingly.

Notwithstanding anything in Section 5 of the Dentists Act, 1878, the rights of any person registered under the Dentists Act, 1878, to practise dentistry or dental surgery in any part of Her Majesty's dominions other than the United Kingdom shall be subject to any local law in force in that part.

It shall be lawful for Her Majesty at any time after the said appointed day to declare by Order in Council that Section 28 of the said Dentists Act, 1878, shall be in force on and after a day to be named in such Order, but in the meantime and until such order has been made, and before such day as last aforesaid, such section shall not be deemed to be in force.

Save as in this Act mentioned the Dentists Act, 1878, shall not be affected by this Act.

*Definitions.**Definitions.*

27. In this Act, unless the context otherwise requires,—

The expression "part of the United Kingdom" means, according to circumstances, England, Scotland or Ireland:

The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, but inclusive of the Isle of Man and the Channel Islands; and where parts of such dominions are under both a central and a local legislature, all parts under one central legislature are for the purposes of this definition deemed to be one British possession:

The expression "local law" means an Act or Ordinance passed by the legislature of a British possession:

The expression "the appointed day" means the first of June one thousand eight hundred and eighty-seven, or such other day in June one thousand eight hundred and eighty-seven as may be appointed by the Privy Council:

The expression "medical corporation" means any body in the United Kingdom, other than a university, for the time being competent to grant a diploma or diplomas conferring on the holder thereof, if he has passed a qualifying examination, the right of registration under the Medical Acts:

The expression "registered medical practitioner" means any person for the time being registered under the Medical Acts:

The word "diploma" means any diploma, degree, fellowship, membership, license, authority to practise, letters testimonial, certificate or other status or document granted by any university, corporation, college or other body, or by any departments of or persons acting under the authority of the Government of any country or place within or without Her Majesty's dominions:

The expression "medical diploma" means a diploma granted in respect of medicine, surgery and midwifery, or any of them, or any branch of medicine or surgery:

The word "person" includes a body of persons corporate or not corporate:

The expression "the Medical Acts" means the Medical Act, 1858, and any Acts amending the same, passed before the passing of this Act.

21 & 22 Vict., c. 90.

Repeal.

28. The Acts mentioned in the first part of the schedule to this Act are hereby repealed to the extent mentioned in the third column of the said part: and the Acts mentioned in the second part of the said schedule shall be repealed on and after the appointed day to the extent mentioned in the third column of the said last-mentioned part: provided that the repeal enacted by this section shall not affect anything done or suffered, or any right or title acquired or accrued, before such repeal takes effect, or any remedy, penalty or proceeding in respect thereof.

THE SCHEDULE.

FIRST PART.

Session and Chapter.	Title or short title of Act.	Extent of Repeal.
21 & 22 Vict., c. 90 ...	The Medical Act, 1858	Sections 4 and 5. Section 24.
46 & 47 Vict., c. 19 ...	The Medical Act (1858) Amendment Act, 1883.	The whole Act.

SECOND PART.

21 & 22 Vict., c. 90 ...	The Medical Act, 1858	Section 31.
31 & 32 Vict., c. 29 ...	The Medical Act Amendment Act, 1868.	The whole Act.

ORDER IN COUNCIL.

AT THE COURT AT WINDSOR.

The 9th day of May, 1892.

PRESENT:

The Queen's Most Excellent Majesty.
Lord President.
Lord Steward.
Earl of Yarborough.
Sir Walter Barttelot, Bart.
Mr. Forwood.

Whereas by "The Medical Act, 1886," it is provided amongst other things that Her Majesty may from time to time by Order in Council declare that the Second part of the said Act shall be deemed, on and after a day to be named in such Order, to apply to any British possession, which in Her Majesty's opinion affords to the medical practitioners of the United Kingdom such privileges of practising in the said British possession as to Her Majesty may seem just, and from and after the day named in such Order in Council such British possession shall be deemed to be a British possession to which the said Act applies within the meaning of the Second Part thereof, and that until such Order in Council has been made in respect of any British possession, the said Second Part of the said Act shall not be deemed to apply to any such possession:

And whereas India is a British possession within the meaning of the said Act, and affords, in Her Majesty's opinion, to the registered medical practitioners of the United Kingdom such privileges of practising in India as to Her Majesty seems just:

Now, therefore Her Majesty doth hereby, by and with the advice of Her Privy Council, order, direct and declare that on and after the first day of July in the year of our Lord one thousand eight hundred and ninety-two the Second Part of "The Medical Act, 1886" shall be deemed to apply to India.

Herbert M. Suft.

COLONIAL PROBATES ACT, 1892.

[55 VICTORIA, CHAPTER 6.]

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions.

[20TH MAY, 1892]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows:

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the court of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modification specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

2. (1) Where a court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and thereupon shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court.

(2) Provided that the court shall, before sealing a probate or letters of administration under this section, be satisfied—

(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(b) in the case of letters of administration that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate; and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3) The court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4) For the purposes of this section a duplicate of any probate or letters of administration sealed with the seal of the court granting the same, or a copy thereof certified as correct by or under the authority of the court granting the same, shall have the same effect as the original.

(5) Rules of court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and, subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

3. This Act shall extend to authorise the sealing in the United Kingdom of any probate or letters of administration granted by a British court in a foreign country in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this Act applies and the provisions of this Act shall apply accordingly with the necessary modifications.

4. (1) Every Order in Council made under this Act shall be laid before both Houses of Parliament as soon as may be after it is made, and shall be published under the authority of Her Majesty's Stationery Office.

(2) Her Majesty the Queen in Council may revoke or alter any Order in Council previously made under this Act.

(3) Where it appears to Her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part it shall be lawful for Her Majesty to direct by Order in Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

5. This Act when applied by an Order in Council to a British possession shall, subject to the provisions of the Order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

Definitions.

6. In this Act

The expression "court of probate" means any court or authority, by whatever name designated having jurisdiction in matters of probate, and in Scotland means the sheriff court of the county of Edinburgh :

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively.

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted :

The expression "British court in a foreign country" means any British court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

Short title.

7. This Act may be cited as the Colonial Probates Act, 1892.

SHORT TITLES ACT, 1892.

[55 VICTORIA, CHAPTER 10.]

An Act to facilitate the Citation of sundry Acts of Parliament.

[20TH MAY, 1892.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Each of the Acts mentioned in the First Schedule to this Act may, without prejudice to any other mode of citation, be cited by the short title therein mentioned in that behalf.

(2) Each of the groups of Acts mentioned in the Second Schedule to this Act may, without prejudice to any other mode of citation, be cited by the collective title therein mentioned in that behalf.

(3) If any Act passed after this Act is directed, as to the whole or any part thereof, to be read with any of the groups of Acts mentioned in the Second Schedule to this Act, that group shall be construed as including that Act or part, and if the collective title of the group states the first and last years of the group, the year in which that Act is passed shall be substituted for the last year of the group, and so on as often as a subsequent Act or part is added to the group.

Short title.

2. This Act may be cited as the Short Titles Act 1892.

FIRST SCHEDULE.

SHORT TITLES.

Session and Chapter.	Title.	Short Title.
•	•	•
27 Hen, 8, c. 10	An Acte concenyng uses and wylles.	The Statute of Uses.
•	•	•
29 Chas. 2, c. 3	An Act for prevention of Frauds and Perjuries.	The Statute of Frauds.
•	•	•
31 Chas. 2, c. 2	An Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas.	The Habeas Corpus Act, 1679.

Session and Chapter.	Title.	Short Title.
*	*	*
1 Will. & Mary Sess. 2, c. 2.	An Act declaring the rights and liberties of the Subject and setting the Succession to the Crown.	The Bill of Rights.
*	*	*
12 & 13 Will. 3, c. 2 ...	An Act for the further limitation of the Crown and better securing the rights and liberties of the Subject.	The Act of Settlement.
*	*	*
6 Anne, c. 41 ...	An Act for the Security of Her Majesty's Person and Government and of the Succession to the Crown of Great Britain in the Protestant Line.	The Succession to the Crown Act, 1707.
*	*	*
10 Geo. 3, c. 47 ...	An Act for better regulating Persons employed in the Service of the East India Company, and for other Purposes therein mentioned.	The East India Company Act, 1770.
*	*	*
13 Geo. 3, c. 63 ...	An Act for establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe.	The East India Company Act, 1772.
*	*	*
21 Geo. 3, c. 70 ...	An Act the title of which begins with the words "An Act to explain and amend so much of an Act" and ends with the words "to the Process of the Supreme Court."	The East India Company Act, 1780.
*	*	*
24 Geo. 3, Sess. 3, c. 25.	An Act for the better Regulation and Management of the Affairs of the East India Company and of the British Possessions in India, and for establishing a Court of Judicature for the more speedy and effectual Trial of Persons accused of Offences committed in the East Indies.	The East India Company Act, 1784.
*	*	*
26 Geo. 3, c. 57 ..	An Act for the further Regulation of the Trial of Persons accused of certain Offences committed in the East Indies; and for the more easy Proof, in certain Cases, of Deeds and Writings executed in Great Britain or India.	The East India Company Act, 1786.
*	*	*

Session and Chapter.	Title.	Short Title
33 Geo. 3, c. 52 ...	An Act for continuing in the East India Company for a further Term the Possession of the British Territories in India, together with their exclusive Trade, under certain Limitations; for establishing further Regulations for the Government of the said Territories and the better Administration of Justice within the same; for appropriating to certain uses the Revenues and Profits of the said Company; and for making Provision for the good Order and Government of the Towns of Calcutta, Madras, and Bombay.	The East India Company Act, 1793.
37 Geo. 3, c. 142 ...	An Act for the better Administration of Justice at Calcutta, Madras, and Bombay; and for preventing British Subjects from being concerned in Loans to the Native Princes in India.	The East India Act, 1797.
39 & 40 Geo 3, c. 79 ...	An Act for establishing further Regulations for the Government of the British Territories in India, and the better Administration of Justice within the same.	The Government of India Act, 1800.
49 Geo. 3, c. 126 ...	An Act for the further Prevention of the Sale and Brokerage of Offices.	The Sale of Offices Act, 1809.
53 Geo. 3, c. 155 ...	An Act the title of which begins with the words "An Act for continuing in the "East India Company" and ends with the words "Limits of the said Company's "Charter."	The East India Company Act, 1813.
5 Geo. 4, c. 113. ...	An Act to amend and consolidate the Laws relating to the Abolition of the Slave Trade.	The Slave Trade Act, 1824.
6 Geo. 4. c. 78 ...	An Act to repeal the several Laws relating to the Performance of Quarantine, and to make other Provisions in lieu thereof.	The Quarantine Act, 1825.
9 Geo. 4, c. 74 ...	An Act for improving the Administration of Criminal Justice in the East Indies.	The Criminal Law (India) Act, 1828.

Session and Chapter.	Title.	Short Title.
2 & 3 Will. 4, c. 53. ...	An Act for consolidating and amending the Laws relating to the Payment of Army Prize Money.	The Army Prize Money Act, 1832.
•	•	•
•	•	•
3 & 4 Will. 4, c. 15 ...	An Act to amend the Laws relating to Dramatic Literary Property.	The Dramatic Copyright Act, 1833.
•	•	•
3 & 4 Will. 4, c. 41 ...	An Act for the better Administration of Justice in His Majesty's Privy Council.	The Judicial Committee Act, 1833.
•	•	•
3 & 4 Will. 4, c. 85 ...	An Act for effecting an Arrangement with the East India Company and for the better Government of His Majesty's Indian Territories till the Thirtieth day of April one thousand eight hundred and fifty-four.	The Government of India Act, 1833.
•	•	•
4 & 5 Will. 4, c. 24 ...	An Act to alter, amend and consolidate the Laws for regulating the Pensions. Compensations, and Allowances to be made to Persons in respect of their having held Civil Offices in His Majesty's Service.	The Superannuation Act, 1834.
•	•	•
5 & 6 Vict., c. 45 ...	An Act to amend the Law of Copyright.	The Copyright Act 1842.
•	•	•
6 & 7 Vict., c. 38 ...	An Act to make further Regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.	The Judicial Committee Act, 1843.
•	•	•
6 & 7 Vict., c. 98 ...	An Act for the more effectual Suppression of the Slave Trade.	The Slave Trade Act, 1843.
•	•	•
7 & 8 Vict., c. 12 ...	An Act to amend the Law relating to International Copyright.	The International Copyright Act, 1844.
•	•	•
7 & 8 Vict., c. 69 ...	An Act for amending an Act passed in the Fourth Year of the Reign of His late Majesty, entitled, "An Act for the better Administration of Justice in His Majesty's Privy Council"; and to extend its Jurisdiction and Power.	The Judicial Committee, Act, 1844.

Session and Chapter.	Title.	Short Title.
* 10 & 11 Vict., c. 62.	* An Act for the Establishment of Naval Prisons and for the Prevention of Desertion from Her Majesty's Navy.	* The Naval Deserters Act, 1847.
* 10 & 11 Vict., c. 95.	* An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copy-right in the United Kingdom.	* The Colonial Copyright Act, 1847.
* 13 & 14 Vict., c. 26.	* An Act to repeal an Act of the Sixth Year of King George the Fourth for encouraging the capture of Destruction of Piratical Ships and Vessels. and to make other Provisions in lieu thereof.	* The Piracy Act, 1850.
* 14 & 15 Vict., c. 81.	* An Act to authorize the Removal from India of Insane Persons charged with Offences, and to give better Effect to Inquisitions of Lunacy taken in India.	* The Lunatics Removal (India) Act, 1851.
* 16 & 17 Vict., c. 95.	* An Act to provide for the Government of India.	* The Government of India Act, 1853.
* 17 & 18 Vict., c. 77	* An Act to provide for the Mode of passing Letters Patent and other Acts of the Crown relating to India, and for vesting certain Powers in the Governor-General of India in Council.	* The Government of India Act, 1854.
* 19 & 20 Vict., c. 113.	* An Act, to provide for taking Evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals.	* The Foreign Tribunals Evidence Act, 1856.
* 21 & 22 Vict., c. 106.	* An Act for the better Government of India.	* The Government of India Act, 1858.
* 22 Vict., c. 20.	* An Act to provide for taking Evidence in Suit and Proceedings pending before Tribunals in Her Majesty's Dominions in Places out of the jurisdiction of such Tribunals.	* The Evidence by Commission Act, 1859.

Session and Chapter.	Title.	Short Title.
* 22 & 23 Vict., c. 41.	* An Act to amend the Act for the better Government of India.	* The Government of India Act, 1859.
* 22 & 23 Vict., c. 68.	* An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof.	* The British Law Ascertainment Act, 1859.
* 23 & 24 Vict., c. 122	* An Act to enable the Legislatures of Her Majesty's Possessions abroad to make Enactments similar to the Enactment of the Act Ninth George the Fourth, Chapter thirty-one, section eight.	* The Admiralty Offences (Colonial) Act 1860.
* 24 & 25 Vict., c. II.	* An Act to afford Facilities for the better Ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions.	* The Foreign Law Ascertainment Act, 1861.
* 24 & 25 Vict., c. 54.	* An Act to confirm certain Appointments in India, and to amend the Law concerning the Civil Service there.	* The Indian Civil Service Act, 1861.
* 24 & 25 Vict., c. 97.	* An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property.	* The Malicious Damage Act, 1861.
* 24 & 25 Vict., c. 104.	* An Act for establishing High Courts of Judicature in India.	* The Indian High Courts Act, 1861.
* 24 & 25 Vict., c. 114	* An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.	* The Wills Act, 1861.
* 24 & 25 Vict., c. 121.	* An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident Abroad, and of Foreign Subjects dying whilst resident within Her Majesty's Dominions.	* The Domicile Act, 1861.

Session and Chapter.	Title.	Short Title.
*	*	*
25 & 26 Vict., c. 68.	An Act for amending the Law relating to Copyright in works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.	The Fine Arts Copyright Act, 1862.
*	*	*
39 & 40 Vict., c. 46.	An Act for more effectually punishing offences against the Laws relating to the Slave Trade.	The Slave Trade Act, 1876.
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SECOND SCHEDULE.

COLLECTIVE TITLES.

Session and Chapter.	Short Title.	Collective Title.
*	*	*
6 & 7 Will. 4, c. 86.	The Births and Deaths Registration Act, 1836.	The Births and Deaths Registration Acts, 1836 to 1874.
7 Will. 4 & 1 Vict., c. 22.	The Births and Deaths Registration Act, 1837.	
21 & 22 Vict., c. 25.	The Births and Deaths Registration Act, 1858.	
37 & 38 Vict., c. 88.	The Births and Deaths Registration Act, 1874.	
*	*	*
25 & 26 Vict., c. 89.	The Companies Act, 1862.	The Companies Acts, 1862 to 1890.
27 & 28 Vict., c. 19.	The Companies Seals Act, 1864.	
30 & 31 Vict., c. 131.	The Companies Act, 1867.	
33 & 34 Vict., c. 104.	The Joint Stock Companies Arrangement Act, 1870.	
40 & 41 Vict., c. 26.	The Companies Act, 1877.	

Session and Chapter.	Short Title.	Collective Title.
42 & 43 Vict., c. 76.	The Companies Act, 1879.	The Companies Acts, 1862 to 1890.
43 Vict., c. 19.	The Companies Act, 1880.	
46 & 47 Vict., c. 30.	The Companies (Colonial Registers) Act, 1883.	
49 & 50 Vict., c. 23.	The Companies Act, 1886.	
53 & 54 Vict., c. 62.	The Companies (Memorandum of Association) Act, 1890.	
53 & 54 Vict., c. 63.	The Companies (Winding-up) Act, 1890.	The Copyright Acts.
*	*	
8 Geo. 2, c. 13.	The Engraving Copyright Act, 1734.	
7 Geo. 3, c. 38.	The Engraving Copyright Act, 1766.	
15 Geo. 3, c. 53.	The Copyright Act, 1775.	
17 Geo. 3, c. 57.	The Prints Copyright Act, 1777.	
54 Geo. 3, c. 56.	The Sculpture Copyright Act, 1814.	
3 & 4 Will. 4, c. 15.	The Dramatic Copyright Act, 1833.	
5 & 6 Will. 4, c. 65.	The Lectures Copyright Act, 1835.	
6 & 7 Will. 4, c. 59.	The Prints and Engravings Copyright (Ireland) Act, 1836.	
6 & 7 Will. 4, c. 110.	The Copyright Act, 1836.	
5 & 6 Vict., c. 45.	The Copyright Act, 1842.	
10 & 11 Vict., c. 95.	The Colonial Copyright Act, 1847.	
25 & 26 Vict., c. 68.	The Fine Arts Copyright Act, 1862.	
*	*	
12 & 13 Vict., c. 68.	The Consular Marriage Act, 1849.	The Foreign Marriage Acts, 1849 to 1891.
31 & 32 Vict., c. 61.	The Consular Marriage Act, 1868.	
53 & 54 Vict., c. 47.	The Marriage Act, 1890.	
54 & 55 Vict., c. 74.	The Foreign Marriage Act, 1891.	The International Copyright Acts.
*	*	
7 & 8 Vict., c. 12.	The International Copyright Act, 1844.	
15 & 16 Vict., c. 12.	The International Copyright Act, 1852.	
25 & 26 Vict., c. 68.	The Fine Arts Copyright Act, 1862.	
33 & 39 Vict., c. 12.	The International Copyright Act, 1875.	
49 & 50 Vict., c. 33.	The International Copyright Act, 1886.	

Session and Chapter.	Short Title.	Collective Title.
21 & 22 Vict., c. 90.	The Medical Act.	The Medical Acts.
22 Vict., c. 21.	The Medical Act, 1859.	
23 & 24 Vict., c. 7.	The Medical Acts Amendment Act, 1860.	
39 & 40 Vict., c. 40.	The Medical Practitioners Act, 1876.	
39 & 40 Vict., c. 41.	The Medical Act, 1876.	
49 & 50 Vict., c. 48.	The Medical Act, 1886.	
17 & 18 Vict., c. 104.	The Merchant Shipping Act, 1854.	The Merchant Shipping Acts, 1854 to 1890.
18 & 19 Vict., c. 91.	The Merchant Shipping Act (Amendment) Act, 1855.	
19 & 20 Vict., c. 41.	The Seamen's Savings Bank Act, 1856.	
25 & 26 Vict., c. 68.	The Merchant Shipping Act, Amendment Act, 1862.	
30 & 31 Vict., c. 124.	The Merchant Shipping Act, 1867.	
31 & 32 Vict., c. 129.	The Colonial Shipping Act, 1868.	
32 & 33 Vict., c. 11.	The Merchant Shipping (Colonial) Act, 1869.	
34 & 35 Vict., c. 110.	The Merchant Shipping Act, 1871.	
35 & 36 Vict., c. 73.	The Merchant Shipping Act, 1872.	
36 & 37 Vict., c. 85.	The Merchant Shipping Act, 1873.	
39 & 40 Vict., c. 80.	The Merchant Shipping Act, 1876.	
42 & 43 Vict., c. 72.	The Shipping Casualties Investigations Act, 1879.	
43 & 44 Vict., c. 16.	The Merchant Seamen (Payment of Wages and Rating) Act, 1880.	
43 & 44 Vict., c. 18.	The Merchant Shipping Act, (1864) Amendment Act, 1880.	
43 & 44 Vict., c. 22.	The Merchant Shipping (Fees and Expenses) Act, 1880.	
43 & 44 Vict., c. 43.	The Merchant Shipping (Carriage of Grain) Act, 1880.	
45 & 46 Vict., c. 55.	The Merchant Shipping (Expenses) Act, 1882.	
45 & 46 Vict., c. 76.	The Merchant Shipping (Colonial Inquiries) Act, 1882.	

Session and Chapter.	Short Title.	Collective Title.
46 & 47 Vict., c. 41.	The Merchant Shipping (Fishing Boats) Act, 1883.	The Merchant Shipping Acts 1854 to 1890.
50 & 51 Vict., c. 4.	The Merchant Shipping (Fishing Boats) Act, 1887.	
50 & 51 Vict., c. 62.	The Merchant Shipping (Miscellaneous) Act, 1887.	
51 & 52 Vict., c. 24.	The Merchant Shipping (Life Saving Appliances) Act, 1888.	
52 & 53 Vict., c. 43.	The Merchant Shipping (Tonnage) Act, 1889.	
52 & 53 Vict., c. 46.	The Merchant Shipping Act, 1889.	
52 & 53 Vict., c. 68.	The Merchant Shipping (Pilotage) Act, 1889.	
52 & 53 Vict., c. 73.	The Merchant Shipping (Colours) Act, 1889.	
53 & 54 Vict., c. 9.	The Merchant Shipping Act, 1890.	The Passengers Acts, 1855 to 1889.
* * *	* * *	
18 & 19 Vict., c. 119.	The Passengers Act, 1855.	
24 & 25 Vict., c. 52.	The Australian Passengers Act, 1861.	
26 & 27 Vict., c. 51.	The Passengers Act Amendment Act, 1863.	
33 & 34 Vict., c. 95.	The Passengers Act Amendment Act 1870.	
35 & 36 Vict., c. 73.	The Merchant Shipping Act, 1872 (so far as it amends the Passengers Acts.)	
39 & 40 Vict., c. 80.	The Merchant Shipping Act, 1876 (so far as it amends the Passengers Acts.)	
52 & 53 Vict., c. 29.	The Passengers Acts Amendment Act, 1889.	The Post Office Acts, 1837 to 1891.
* * *	* * *	
7 Will. 4 & 1 Vict., c. 33.	The Post Office Management Act, 1837.	
7 Will. 4 & 1 Vict., c. 36.	The Post Office (Offences) Act, 1837.	
3 & 4 Vict., c. 96.	The Post Office (Duties) Act, 1840.	
7 & 8 Vict., c. 49.	The Post Office (Duties) Act, 1844.	
10 & 11 Vict., c. 85.	The Post Office (Duties) Act, 1847.	
11 & 12 Vict., c. 88.	The Post Office (Money Order) Act, 1848.	
12 & 13 Vict., c. 66.	The Colonial Inland Post Office Act, 1849.	
23 & 24 Vict., c. 65.	The Post Office (Duties) Act, 1860.	

Section and Chapter.	Short Title.	Collective Title.
26 & 27 Vict., c. 43.	The Post Office Lands Act, 1863.	The Post Office Acts, 1837 to 1891.
31 & 32 Vict., c. 110.	The Telegraph Act, 1868.	
32 & 33 Vict., c. 73.	The Telegraph Act, 1869.	
33 & 34 Vict., c. 79.	The Post Office Act, 1870.	
34 & 35 Vict., c. 30.	The Post Office (Duties) Act, 1871.	
38 & 39 Vict., c. 22.	The Post Office Act, 1875.	
43 & 44 Vict., c. 33.	The Post Office (Money Orders) Act, 1880.	
44 & 45 Vict., c. 19.	The Post Office Newspaper Act, 1881.	
44 & 45 Vict., c. 20.	The Post Office (Land) Act, 1881.	
45 & 46 Vict., c. 2.	The Post Office (Reply Post Cards) Act, 1882.	
45 & 46 Vict., c. 74.	The Post Office (Parcels) Act, 1882.	
46 & 47 Vict., c. 58.	The Post Office (Money Orders) Act, 1883.	
47 & 48 Vict., c. 76.	The Post Office (Protection) Act, 1884.	
48 & 49 Vict., c. 58.	The Telegraph Act, 1885.	
52 & 53 Vict., c. 34.	The Telegraph (Isle of Man) Act, 1889.	
54 & 55 Vict., c. 48.	The Post Office Act, 1891.	
•	•	•
11 & 12 Vict., c. 88.	The Post Office (Money Orders) Act, 1848.	The Post Office (Money Orders) Acts 1848 to 1883.
43 & 44 Vict., c. 33.	The Post Office (Money Orders) Act, 1880.	
46 & 47 Vict., c. 58.	The Post Office (Money Orders) Act, 1883.	
•	•	•

INDIAN COUNCILS ACT, 1892.

[55 & 56 VICTORIA, CHAPTER 14.]

An Act to amend the Indian Councils Act, 1861.

[20TH JUNE, 1892.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. (1) The number of additional members of Council nominated by the Governor-General under the provisions of section ten of the Indian Councils Act, 1861, shall be such as to him may seem from time to time expedient, but shall not be less than ten nor more than sixteen; and the
- Provisions for increase of number of members of Indian Councils for making laws and regulations.

number of additional members of Council nominated by the Governors of the presidencies of Fort St. George and Bombay respectively under the provisions of section twenty-nine of the Indian Councils Act, 1861, shall (besides the advocate-general of the presidency or officer acting in that capacity) be such as to the said Governors respectively may seem from time to time expedient, but shall not be less than eight nor more than twenty.

(2) It shall be lawful for the Governor-General in Council by proclamation from time to time to increase the number of councillors whom the Lieutenant-Governors of the Bengal Division of the presidency of Fort William and of the North-Western Provinces and Oudh respectively may nominate for their assistance in making laws and regulations: Provided always that not more than twenty shall be nominated for the Bengal Division, and not more than fifteen for the North-Western Provinces and Oudh.

(3) Any person resident in India may be nominated an additional member of Council under sections ten and twenty-nine of the Indian Councils Act, 1861, and this Act, or a member of the Council of the lieutenant-governor of any province to which the provisions of the Indian Councils Act, 1861, touching the making of laws and regulations, have been or are hereafter extended or made applicable.

(4) The Governor-General in Council may from time to time, with the approval of the Secretary of State in Council, make regulations as to the conditions under which such nominations, or any of them, shall be made by the Governor-General, Governors, and Lieutenant-Governors respectively, and prescribe the manner in which such regulations shall be carried into effect.

2. Notwithstanding any provision in the Indian Councils Act, 1861, the Governor-General of India in Council may from time to time make rules authorising at any meeting of the Governor-General's Council for the purpose of making laws and regulations the discussion of the Annual Financial Statement of the Governor-General in Council and the asking of questions, but under such conditions and restrictions as to subject or otherwise as shall be in the said rules prescribed or declared: And notwithstanding any provisions in the Indian Councils Act, 1861, the Governors in Council of Fort St. George and Bombay respectively, and the lieutenant-governor of any province to which the provisions of the Indian Council Act, 1861, touching the making of laws and regulations, have been more or are hereafter extended or made applicable, may from time to time make rules for authorising at any meeting of their respective Councils for the purpose of making laws and regulations the discussion of the Annual Financial Statement of their respective local governments, and the asking of questions, but under such conditions and restrictions as to subject or otherwise as shall in the said rules applicable to such Councils respectively be prescribed or declared. But no member at any such meeting of any Council shall have power to submit or propose any resolution, or to divide the Council in respect of any such financial discussion, or the answer to any question asked under the authority of this Act, or the rules made under this Act: Provided that any rule made under this Act by a governor in council, or by a lieutenant-governor, shall be submitted for and shall be subject to the sanction of the Governor-General in Council, and any rule made under this Act by the Governor-General in Council shall be submitted for and shall be subject to the sanction of the Secretary of State in Council: Provided also that rules made under this Act shall not be subject to alteration or amendment at meetings for the purpose of making laws and regulations.

Modification of provisions of 24 & 25 Vict., c. 67, as to business at Legislative meetings.

3. It is hereby declared that in the twenty-second section of the Indian Councils Act, 1861, it was and is intended that the words "Indian territories now under the dominion of Her Majesty" should be read and construed as if the words "or hereafter" were and at the time of the passing of the said Act been inserted next after the word "now"; and further, that the Acts third and fourth William the Fourth, Chapter eighty-five, and sixteenth and seventeenth Victoria, Chapter ninety-five, respectively, shall be read and construed as if at the date of the enactment thereof respectively it was intended and had been enacted that the said Acts respectively should extend to and include the territories acquired after the dates thereof respectively by the East India Company, and should not be confined to the territories at the dates of the said enactments respectively in the possession and under the government of the said company.

Meaning of 24 & 25 Vict., c. 67, s. 22; 3 & 4 Will. IV, c. 85; and 16 & 17 Vict., c. 95.

Repeal. Power to fill up vacancy in number of additional members.

4. Sections thirteen and thirty-two of the Indian Councils Act, 1861, are hereby repealed, and it is enacted that—

(1) If any additional member of Council or any member of the council of a lieutenant-governor appointed under the said Act or this Act shall be absent from India or unable to attend to the duties of his office for a period of two consecutive months, it shall be lawful for the Governor-General, the governor, or the lieutenant-governor to whose council such additional member or member may have been nominated (as the case may be) to declare, by a notification published in the Government Gazette, that the seat in Council of such person has become vacant:

(2) In the event of a vacancy occurring by the absence from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted of any such additional member or member of the council of a lieutenant-governor, it shall be lawful for the Governor-General, for the governor, or for the lieutenant-governor, as the case may be, to nominate any person as additional member or member, as the case may be, in his place; and every member so nominated shall be summoned to all meetings held for the purpose of making laws and regulations for the term of two years from the date of such nomination: Provided always that it shall not be lawful by such nomination, or by any other nomination made under this Act, to diminish the proportion of non-official members directed by the Indian Councils Act, 1861, to be nominated.

5. The local legislature of any province in India may from time to time, by Acts passed under and subject to the provisions of the Indian Councils Act, 1861, and with the previous sanction of the Governor-General, but not otherwise, repeal or amend as to that province any law or regulation made either before or after the passing of this Act by any authority in India other than that local legislature: Provided that an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of the Indian Councils Act, 1861, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this section.

Powers of Indian provincial legislatures.

Definitions.

6. In this Act—

The expression "local legislature" means—

(1) The Governor in Council for the purpose of making laws and regulations of the respective provinces of Fort St. George and Bombay; and

(2) The council for the purpose of making laws and regulations of the lieutenant-governor of any province to which the provisions of the Indian Councils Act, 1861, touching the making of laws or regulations have been or are hereafter extended or made applicable:

The expression "province" means any presidency, division, province or territory over which the powers of any local legislature for the time being extend.

Saving of powers of Governor-General in Council. 7. Nothing in this Act shall detract from or diminish the powers of the Governor-General in Council at meetings for the purpose of making laws and regulations.

8 This Act may be cited as the Indian Councils Act, 1892; and the Indian Councils Act, 1861, and this Act may be cited together as the Indian Councils Acts, 1861 and 1892.

Short title.

Passed on the 29th July 1892.

ACT No. VI of 1892.

An Act to amend the Indian Limitation Act, 1877, and the Code of Civil Procedure.

WHEREAS it is expedient to amend the Indian Limitation Act (XV of 1877) and the Code of Civil Procedure (XIV of 1882); it is hereby enacted as follows:

Addition of new section after section 5, Act XV of 1877. I. After section 5 of the Indian Limitation Act (XV of 1877), the following section shall be added, namely:

"5A. Whenever it is shown to the satisfaction of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by any order, or practice, or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor."

Addition of new section to Chapter XXII of Code of Civil Procedure. 2. To Chapter XXII of the Code of Civil Procedure (XIV of 1882), the following section shall be added, namely:

Applications for execution of decrees not affected. "375A. Nothing in this Chapter shall apply to any application or other proceeding in any suit subsequent to the decree.

"*Explanation.*—An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section."

Addition of new section after section 582 of said Code. 3. After section 582 of the said Code the following section shall be added, namely:

"582A. If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped and the insufficiency of the stamp was caused by a mistake on the part of the appellant or applicant as to the amount of the requisite stamp, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped: Provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the Court."

Validation of certain memoranda of appeals or applications for review of judgment.

26th Nov 1892.

Addition to section 647 of said Code. 4. To section 647 of the said Code the following shall be added, namely:—

“Explanation.—This section does not apply to applications for the execution of decrees, which are proceedings in suits.”

5. The provisions of this Act shall apply to every appeal and review of Application of Act. judgment heard after the passing hereof, notwithstanding that the judgment appealed from or under review may have been passed, or the petition of appeal or application for review presented, before the passing of this Act.

ACT No. X of 1892.

Passed on the 25th October 1892.

An Act to provide for the levy of a rate on private estates under the management of the Government to meet the cost of supervision and management.

WHEREAS it is expedient to provide for the levy of a rate on private estates under the management of the Government to cover the cost of all Government establishments in so far as they are employed in the supervision and management of such estates, other than establishments specially entertained for any particular estate or group of estates, and to meet all contingent expenditure incurred by the Government in connection with such supervision and management; It is hereby enacted as follows :—

Title, extent and commencement.

1. (1) This Act may be called the Government Management of Private Estates Act, 1892.

(2) It extends to the whole of British India, inclusive of Upper Burma and British Baluchistan; and

(3) It shall come into force at once.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) “immoveable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass.

(2) “gross income” includes all receipts of every kind in produce or cash except money borrowed, recoveries of principal and the proceeds of sale of immoveable property or of moveable property properly classed as capital; and

(3) “private estates under Government management” include—

- (a) estates under the Court of Wards;
- (b) encumbered estates under Government management;
- (c) estates attached for default of payment of Government revenue;
- (d) minors' estates placed under the guardianship of a revenue-officer of the Government by a Civil Court;
- (e) estates managed by a Collector in pursuance of any order made under the Code of Civil Procedure XIV of 1882: and
- (f) all other estates made over to, or taken under the management of, a revenue-officer of the Government as such under any law for the time being in force or in virtue of any agreement.

Power to levy rate.

3. It shall be lawful for the Local Government—

(1) to levy on all private estates under Government management a rate not exceeding five per cent. on the gross income, calculated, as nearly as may be possible, to cover—

- (a) the cost of all Government establishments in so far as they may be employed in the supervision or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates, and
- (b) all contingent expenditure incurred in consequence of such supervision or management;

(2) from time to time to vary such rate; and

- (3) to reduce or remit such rate in any special case or cases as may be equitable :

Provided that, in deciding the amount of the rate to be levied under the Act on any particular estate or group of estates, the Local Government shall consider the expenditure incurred on special establishments for such estate or estates.

4. In cases where an officer of the Government is employed to give legal Power to levy special advice or to audit accounts on behalf of any estate, the charges. Local Government, if it considers the services rendered to be of a special nature, may, in its discretion, direct a special charge to be made against that estate on account of such services, irrespective of the rate leviable under the last foregoing section.

5. Nothing in this Act shall apply to the cost of establishments specially Saving as to special ex- entertained or to expenditure of any description specially incurred in respect of any particular estate or estates. penditure.

6. All rates for general supervision or management levied by any Local Validation of levy of Government before the commencement of this Act shall past rates. be deemed to have been levied under this Act.

7. The Local Government may make any rules and issue any orders which Power to make rules. may be necessary for carrying this Act into effect, and which are consistent therewith.

8. Where any Government establishment is employed in such supervision Exemption from juris- as aforesaid, the Local Government shall be the sole diction of Courts. judge of the cost attributable to such employment, and its decision thereon shall not be questioned in any Court of Law or otherwise.

9. Section 17 of the Court of Wards Act, 1879 (Ben. IX of 1879) (passed by the Lieutenant-Governor of Bengal in Council), and so much of Act III of 1881 (also passed by the Lieutenant-Governor of Bengal in Council) as relates to Section 17 of the said Court of Wards Act, 1879, are hereby repealed.

Ch. 10
12/11/18

